Petition

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Supreme Court, U.S.
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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GEORGE L. EADY,
Petitioner,

v.

YUKIKO ERBE,
Respondent.

ON WRIT OF CERTIORARI
TO THE COURT OF CIVIL APPEALS
OF ALABAMA

PETITION FOR CERTIORARI

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GEORGE L. EADY,

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YUKIKO ERBE,

Respondent.[1]

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS OF ALABAMA

The petitioner George L. Eady prays that a writ of certiorari issue to review the judgment and opinion of the Court of Civil Appeals of Alabama entered on 26 August 1981 in that certain appeal styled *Yukiko Erbe*, Appellant, versus *George L.*

1] This caption contains the names of all parties to the proceeding in the courts below.

Eady, Appellee, and assigned Docket Number Civ. 2852 in that court, as to which said judgment and opinion the said Court of Civil Appeals of Alabama on 23 September 1981 denied the present petitioner's application for rehearing and the Supreme Court of Alabama on 18 December 1981 denied certiorari.

QUESTION PRESENTED FOR REVIEW

1. To what extent does this Court's decision in *McCarty v. McCarty*, __U.S. __, 101 S.Ct. 2728, 69 L.Ed. 2d 589 (1981), apply to a case which: (a) was pending on appeal to a state court at the time of this Court's decision in the *McCarty* case; and (b) seeks to treat a former Air Force enlisted member's retired pay as community property under a California decree which became final on 8 January 1975?

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OPINIONS BELOW

The opinion of the Court of Civil Appeals of Alabama (App. "A1" hereto, a1-1 --a1-13) appears at 406 So.2d 936. The Supreme Court of Alabama rendered no opinion to accompany its denial of certiorari sub nom. *Ex parte Eady* (Separate Appendix D2 hereto, d2-1---d2-2). There is a published report of such denial of certiorari at 406 So.2d 939 (Ala. 1981). A copy of the trial court's decretal order, including findings, comprises Separate Appendix B1 hereto. 2]

JURISDICTION OF THIS COURT

The Court of Civil Appeals of Alabama rendered judgment on 26 August 1981. Entry of the judgment occurred on the same day. The present petitioner (whom we

2] We hereinafter refer to a separate appendix hereto as "Sep. App."

hereinafter call "Eady")[3] applied for a rehearing (Sep. App. E3) with respect to that judgment and the accompanying opinion. The Court of Civil Appeals denied that application on 23 September 1981 (Sep. App. C2). Eady then petitioned the Supreme Court of Alabama for a writ of certiorari to review the judgment of the Court of Civil Appeals of that state. (Sep. App. D1, d1-1---d1-5.) On 18 December 1981, the Supreme Court of Alabama denied Eady's petition. (Sep. App. D2, d2-1---d2-2.) Eady invokes the jurisdiction of this Court under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULE INVOLVED

This case involves the following constitutional provisions, statutes and

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[3] We hereinafter call the respondent also by only her last name, "Erbe."

court rule the relevant parts of all of which appear in Separate Appendix H hereto:

Art. I, §8, cls. 12 and 14, U.S. CONST.;

Art. III, §1, U.S. CONST.;

Art. III, §2, cl. 1, U.S. CONST.;

Art. VI, cl. 2, U.S. CONST.;

10 U.S.C. §8914;

10 U.S.C. §8929;

28 U.S.C. §1257(3);

37 U.S.C. §701(c);

Cal. Civ. Code §4800;

Cal. Civ. Code §4803;

§ 6.02, Amend. 328, ALA. CONST. 1901;

§ 6.03(b), Amend. 328, ALA. CONST. 1901;

Ala. Code 1975, § 12-1-4;

Ala. Code 1975, § 12-2-7;

Ala. Code 1975, § 12-3-10;

Subdivs. (a) and (c) Rule 39, Ala. R. App. P.

STATEMENT OF THE CASE

Eady and Erbe were married to each other for 83% of the more than twenty years that Eady served as an enlisted member of the United States Air Force. Eady retired from the Air Force in 1969.[4]

In 1974, Eady sued for dissolution of the marriage in a California court. Both parties were then domiciled in that state. In the course of the marriage-dissolution proceedings, the parties stipulated that, among other things, Eady was to pay Erbe "an amount equal to 41.5 per cent of ...[Eady's] gross monthly...retirement [pay from the Air Force], to be

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4] All the data set forth in this paragraph of text, except the data as to Eady's enlisted status, come from the opinion of the Court of Civil Appeals of Alabama. (App. A at a1-8, a1-1; 406 So.2d at 438, 436.) All these data, whether precisely correct or not, are undisputed. Data as to Eady's enlisted status and grade at time of retirement appear in Sep. App. F, at f5-20--f5-21.

paid on or before the first day of each month, commencing September...[1,] 1974.... That item of stipulation became part of an interlocutory judgment of dissolution. Final judgment followed, without substantial change, on 8 January 1975.[5]

Neither party appealed from the final California judgment. Nor did either seek any modification of that judgment until Eady, in 1980, included a counterclaim seeking modification in his responsive pleading to the complaint which Erbe had filed in an Alabama court. Both parties

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5] A transcript of the stipulation appears in Sep. App. G, at g-4--g-11. Extract copies of the successive California judgments comprise an exhibit to the judgment of the Alabama trial court in this subsequent action. They appear in Sep. App. B, at b1-10---b1-18. Pertinent parts of the California judgment also appear in the opinion of the Court of Civil Appeals of Alabama (App. A, at a1-2--a1-3; 406 So. 2d at 937.)

had married other persons in 1975.[6]

Eady made no payments of any kind to Erbe after the date of Erbe's remarriage. (App. A, at a1-5; 406 So.2d at 937.) In 1980, Erbe commenced an action in an Alabama court to enforce the California judgment insofar as it provided for monthly payments of 41.5% of Eady's "gross military retirement pay." The Alabama trial court construed the California judgment as not having treated Eady's retired pay as community property. Accordingly, on 31 December 1980, the Alabama trial court denied Erbe relief.[7]

6] The lack of intervening direct attack upon the California judgment and both remarriages are undisputed. In the particular counterclaim mentioned in the text, Eady sought the elimination of the alimony provisions from the California decree. (Sep. App. F, at f3-3--f3-4.)

7] Erbe initially sought to recover a liquidated sum of $16,000.00 on the

Erbe appealed the Alabama trial court's judgment. Such appeal was pending, unsubmitted, on 28 June 1981, when this Court decided *McCarty v. McCarty*, ___U.S.___, 101 S.Ct. 2728, 69 L.Ed.2d 589. Thereupon, Eady raised the federal question here sought to be reviewed. Eady raised that question by a letter in which, after inquiry, his state-court counsel called the Alabama Court of Civil Appeals' attention to the *McCarty* case. That counsel requested the appellate court to "accept... [that] letter as an amendment to ...[his

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interlocutory judgment. (Sep. App. F1, at f1-1--f1-f2.) After Eady answered (Sep. App. F, at f3-1--f3-2), Erbe amended her complaint so as to seek declaratory and supplemental relief, including a money judgment for $18,000.00, upon the basis of the *final* California judgment. (Sep. App. F4, at f4-2--f4-5.) The Alabama trial court found that the California judgment was entitled to full faith and credit but construed the judgment in the manner indicated in the text. (Sep. App. B1, at b1-1--b-2 and b1-b7.)

principal] brief...." (Sep. App. E1, at e1-2.)

In that letter, Eady's state-court counsel contended that the *McCarty* decision had added a new dimension to the pending state-court appeal. He contended that whereas, prior to *McCarty*, the central issue on the appeal had been as to whether the California judgment treated Eady's retired pay as a source of alimony or as community property, the effect of *McCarty* was such that even "[i]f the award [of a percentage of Eady's retired pay]...[were] [an attempted division of] community property,...[Eady] would owe... [Erbe] nothing because...[*McCarty*] held that military retirement pay is not community property and not subject to the community property laws of...California." (Sep. App. E1, at e1-4.) Eady's state-court counsel specifically noted, in his

mentioned "amendment" to his brief, that

> ***[O]ur position [at oral argument] will be that [,] under [*McCarty*,]....the California courts could not enforce this decree, could not award a portion of the military retirement pay, and therefore Alabama is precluded from enforcing the decree from that state or collecting any money based on a judgment rendered under that law which the Supreme Court of the United States declared null and void, as being in conflict with the Supremacy Clause of the United States Constitution.
>
> (Sep. App. E1, at e1-5--e1-6.)[8]

8] By counter letter-"amendment," Erbe invoked res judicata, made a policy of repose argument, and sought to differ-

Finding no revelation in *McCarty* of "an intent [on the part of this Court] to have its decision enforced [*sic*] retrospectively..." (App A1, at a1-12; 406 So. 2d 939), The Alabama Court of Civil Appeals undertook, in terms, to decide "the effect of *McCarty* on the present litigation ...on the basis of the ruling case law of Alabama." (*Id.*)[9] Professedly so proceeding, the Court of Civil Appeals concluded that the doctrine of vested rights, as applied with respect to decisions overruling prior

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entiate McCarty as having been "a 'contested'" case not resting, in its property-division aspect, on any stipulation "simply incorporated in[to]... [a] decree...." (Sep. App. E2, at e2-2---e2-5 and e2-6.)

9] The Court of Civil Appeals further indicated, in a footnote, that it would arrive at the same result if it decided the question "on the basis of the ruling case law of California." (App. A1, at a1-12 n.1; 406 So.2d at 939 n.1, citing *In re Marriage of Brown*, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal.Rptr. 633 (1976).

decisions, precluded *McCarty's* having any "effect on that *portion* of...Eady's retirement benefits due...Erbe *at the time this case was heard in the Alabama trial court.*" (App. A1, at a1-13; 406 So.2d 939; italics ours.) In addition to the first premise that property rights once vested should not be divested by retroactive overruling, the conclusion rested, also, on the second premise that "***Erbe's property rights in ...Eady's military retirement benefits vested when the California court finally awarded *those benefits* to her in 1975. (*Id.*; italics ours.)

REASONS FOR GRANTING THE WRIT

1. To settle important questions of federal law.

The question of the retroactivity *vel non* of this Court's decision in *McCarty v. McCarty* is an important one, both qualitatively and quantitatively. Intrinsically, *McCarty's* interdiction of the appli-

cation of California community property statutes to retired military pay touches an important area of federal-state relationships. In its subordination of the California community property statutes to the federal military retirement statutes, *McCarty* incrementally reduces local hegemony with respect to family law.

Barring reaction, family law appears likely to continue to burgeon. Whether that happens or not, litigants in Eady's situation will continue to ask, *first*, if *McCarty* is not retroactive; *second*, if it is retroactive, does it reach particular pre-*McCarty* property divisions affecting the retired military pay of particular litigants; and, *third*, if *McCarty* is *not* retroactive, as judicial decisions presumably are to one degree or another, what features of either *McCarty* or the particular prior case prevent *McCarty's* applying to that prior case?

And the number of such questioning litigants potentially is substantial. As this Court noted in *McCarty*, "***each of the military services has substantially the same nondisability retirement system ...." 101 S.Ct. at 2731. As this Court also has noted---both in *McCarty*, 101 S.Ct. at 2733, and in *Hisquierdo v. Hisquierdo*, 439 U.S. at 577---there are eight community property states. And as a member of a United States Court of Appeals for a circuit embracing two of those eight states has observed, in the alternative, "Many residents of community property states who will receive military retirement benefits after the date of *McCarty* have obtained or will obtain a judgment of divorce." *Erspan v. Badgett* 659 F.2d 26, 31 (5th Cir., Unit B, 1981) (Ainsworth, Cir. J., dissenting). Eady, of couse, falls into the first of Judge Ainsworth's categories.

Since he does fall into the category of those whose divorce decrees became final, in the sense of no longer being subject to ordinary methods of direct review (Annot., 22 L.Ed.2d 821), before *McCarty*, Eady confessedly must confront more than just the Alabama Court of Civil Appeals' implicit rejection, in this particular case, of decisional retroactivity as a norm. He also must reckon with res judicata---or, more precisely, with the doctrine of collateral estoppel.

Certain principles of adjudication aid Eady in both stages of the confrontation. First, traditional theory, though perhaps often honored as much in the breach as in the observance, regards judicial decisions, particularly in civil cases, as normally having both retrospective and prospective effect. *See, e. g., Hanover Shoe v. United Shoe Mach. Corp.*, 392 U.S. 481 at 495--499 (1968); Traynor, *Quo Vadis*,

Prospective Overruling: A Question of Judicial Responsibility, 28 HAST. L. J. 533 at 534--535 (1977); and Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 YALE L. J. 907 (1962).

Second, and more clearly, "The general rule... is that an appellate court must apply the law in effect at the time it renders its decision." *Thorpe v. Housing Authority of Durham*, 393 U.S. at 281 (1969), citing, among other authorities, *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538 (1941).

Third, in determining, necessarily on an ad hoc basis, whether to *except* particular decisions from retroactivity, this Court usually has considered the following separate factors:

(1) whether the decision in question really amounts to a new departure --whether, in the language of one or more

of the cases, the decision

> establish[es] a new principle of law, either by overruling clear past precedent on which litigants [justifiably, as the context makes clear,] may have relied, see, e. g., Hanover Shoe v United Shoe Machinery Corp.,...[392 US], at 496, 20 L Ed 2d at 1243, or by deciding an issue of first impression whose resolution was not clearly foreshadowed, see, e. g., Allen v State Board of Elections,... [393 US] at 572, 22 L Ed 2d at 20...
>
> (*Chevron Oil Co. v. Huson*, 404 U.S. at 106 [1971].)

(2) whether, if the decision in question does amount to a new departure, the new rule or doctrine is of such nature that retrospective application is either necessary or appropriate to the effectuation of the rule or doctrine; and,

(3) whether retroactive application of such new rule or doctrine will be productive of substantial inequities or otherwise adversely affect the administration of justice.

Cf. Annot., 22 L.Ed.2d 821 and the numerous cases cited therein.

Fourth, a prior final judgment ceases to have preclusive effect when an intervening decision invalidates the legal assumptions, particularly constitutional assumptions, on which the prior judgment necessarily rested. *See, e. g., Blair v. Commissioner,* 300 U.S. at 9 (1937); *State Farm Mut. Auto. Ins. Co. v. Duel,* 324 U.S.

at 160--162 (1944); *Jackson v. DeSoto Parish School Bd.*, 585 F.2d at 729 (5th Cir. 1978); and *Parnell v. Rapides Parish School Bd.*, 563 F.2d at 185 (5th Cir. 1977), *cert. denied*, 438 U.S. 915 (1978).

Prima facie, the Alabama Court of Civil Appeals did not apply the law in force at the time that it rendered its decision in this case. As of that time, the law was that, insofar as the California community property statutes purported to authorize a division of military retired pay as part of a marriage dissolution proceeding, those statutes were not entitled to recognition. The law was such because this Court had said so, in *McCarty*. That decision of this Court was binding upon the Court of Civil Appeals of Alabama with respect to the federal rights adjudicated in *McCarty*. *See, e. g., Stoll v. Gottlieb*, 305 U.S. 165 (1938). Until this Court

had spoken further on the subject, the Alabama Court of Civil Appeals was not at liberty to anticipate a determination by this Court that *McCarty* should not receive retrospective application; or that, in the language of the Court of Civil Appeals, "***_McCarty_ would have no effect on that *portion* of ...Eady's retirement benefits *due* ...Erbe at the time this case was heard in the Alabama trial court." (App. A at a1-13; 406 So.2d at 939; italics, except at *McCarty*, ours.)

McCarty should be fully retroactive, or at the very least should apply to the present case, for at least the following reasons:

(1) Such retroactivity will foster both of the principal goals of the federal military retirement system as perceived in *McCarty* (at 101 S.Ct. 2741) and in the antecedent federal legislation. Such retroactivity will enable the intended

beneficiaries of the system to retain those benefits. News of such retroactivity is unlikely to inhibit enlistments or the acceptance of commissions in the armed forces; rank and file still will be at liberty to provide for their spouses and dependents on a voluntary basis.

(2) Supposed reliance upon pre-*McCarty* law appears likely to be in large part unjustified or illusory. *McCarty* hardly can have come as a complete surprise: *Hisquierdo* in a measure foreshadowed *McCarty*; and, as far back as 1973, the official organ of the California State Bar carried a perceptive article challenging the assumptions upon which the California courts were proceeding in treating "a serviceman's right to receive retired pay from the United States [as] community property for the purpose of division of community assets in a dissolution proceed-

ing." Goldberg, *Is Armed Services Retired Pay Really Community Property?* 48 CALIF. BAR J. 12, at 12 *et passim*. The record in the case at bar is not lacking in evidence tending to show that, years or months before *McCarty*, Eady communicated to Erbe Eady's belief that the 41.5% of his retired pay "was awarded illegally to start with[,] against Federal law...." (Sep. App. F5, at f5-26; and see Erbe's version of the conversation at f5-10.) Moreover, the very existence of other California cases of the sort mentioned in *McCarty* is strongly suggestive, if not demonstrative, of an ongoing controversy with respect to the amenability of military retired pay to characterization as community property. Recurring to the case at bar, Erbe's delay of five years in suing Eady, when she knew where he was living, is *not* indicative either of substantial reliance upon

the California judgment or of hardship or dire need on her part. Finally, any claim that Erbe really relies upon a contract and not on a judgment overlooks at least two points: (a) that the stipulation (Sep. App. G, at g-4--g--11) quite likely was merged, without provision for survival *qua* contract, into the judgment (Sep. App. B, at b1-10--b1-18); and (b) that the Contracts Clause (U.S. Const., art. i, § 10, cl. 1) is not a limitation upon either Congress or courts.

CONCLUSION

For the reasons set forth above, Eady submits that a writ of certiorari should issue to review the judgment and opinion of the Alabama Court of Civil Appeals as

rendered on the appeal identified in the first paragraph of this petition.

Respectfully submitted,



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Appendix

APPENDIX A1

[406 So.2d 936 (Ala. Civ. App. 1981)]

Yukiko ERBE

v.

George L. EADY.

Civ. 2852.

Court of Civil Appeals of Alabama.

Aug. 26, 1981.

Rehearing Denied Sept. 23, 1981.

* * * *

BRADLEY, Judge:

This is an appeal from a judgment construing a California divorce decree.

Yukiko Eady (now Yukiko Erbe) and George Eady were married in Japan. At that time he was a member of the United States Air Force. Mr. Eady remained in the Air Force until 1969, at which time he retired. The parties continued to-

[*937]

*gether as man and wife until May 1974

when they separated. Mr. Eady petitioned a California court for a divorce and on October 18, 1974 an interlocutory judgment dissolving the marriage was handed down. This judgment was made final on January 8, 1975.

The pertinent parts of the judgment are as follows:

> The court also orders that petitioner [Mr. Eady] shall pay to respondent [Mrs. Erbe], as and for spousal support, the sum of $1.00 per month, commencing September 1, 1974, and continuing monthly thereafter until respondent dies or remarries or until further order of this court or until respondent remarries, whichever shall first occur, but in no event beyond September 1, 1984. Respondent waives any and all rights to spousal support from and after that date.
>
> The court also orders that peti-

tioner shall pay to respondent an amount equal to forty-one and one-half (41.5%) percent of his gross monthly military retirement payable on or before the first day of each month, commencing September 1, 1974. This amount presently is in the amount of $178.03 per month.

The court also orders that the community property of the parties is distributed as follows:

To the petitioner as petitioner's sole and separate property:

1. House and lot located at 4170 Polaris Avenue, Vandenberg Village, Lompoc, California;
2. The household furniture, furnishings and appliances located in the home at 4170 Polaris Avenue;
3. The aircraft maintenance tools and other tools; and

4. The 1972 Toyota automobile, California license No. 064FKV, subject to the encumbrance thereon.

To the respondent as respondent's sole and separate property:

1. The Singer sewing machine, two knitting machines, television-stereo console and a Japanese wall clock, subject to the encumbrance on the Singer sewing machine; and

2. The 1968 Ford Thunderbird automobile, California license No. WQH888.

On September 1, 1974 and each month thereafter until June 1975, Mr. Eady sent Mrs. Eady three checks: one check was for one dollar per month spousal support, another check was for an amount equal to forty-one and one-half percent of Mr. Eady's gross monthly military retirement payment, and the other check was for $72.00 which was the monthly payment re-

quired by a promissory note executed by Mr. Eady in favor of Mrs. Eady. No checks were received from Mr. Eady after June 1975.

Mr. Eady remarried on March 31, 1975 and presently resides in Lawrence County, Alabama. Mrs. Eady remarried on May 31, 1975 and lives in California.

On February 6, 1980 Mrs. Erbe filed an action in Morgan County, Alabama which was subsequently transferred to Lawrence County, Alabama, seeking to enforce the military retirement payment provision of the California decree. In July 1980 Mrs. Erbe filed a motion for summary judgment with accompanying affidavits and certified copies of the California decree. This motion was denied. After denial of the motion Mr. Eady filed a motion in opposition to the request for summary judgment. Mrs. Erbe then requested the

trial court to reconsider her motion for summary judgment. This motion was also denied. Mr. Eady then answered the complaint and filed a counterclaim asking the court to treat the military retirement provision of the California judgment as periodic alimony and find that such payments were terminated by Mrs. Eady's remarriage on May 31, 1975.

After an ore tenus hearing the trial court rendered a judgment holding that the California judgment was entitled to full faith and credit but that the military retirement benefits received by Mr. Eady were not treated by the California court as community property but as periodic alimony and thus the payments legally ceased upon the remarriage of Mrs. Eady. Mrs. Erbe appeals from that decree.

[*938]

*The dispositive issue here is wheth-

er the military retirement benefits provision of the California decree is to be construed as a division of community property or as an award of periodic alimony. If the retirement benefits are community property and are subject to division, the trial court erred in not awarding Mrs. Erbe the amount that was in arrears. If the retirement benefits can be classified as periodic alimony---as the trial court so found---and such payments ceased upon Mrs. Erbe's remarriage, the trial court correctly held that Mr. Eady was not in arrears in such payments.

[1] Under California law, military retirements benefits must be considered as community property to the extent they are earned during the marriage. *In re Marraige of Stenquist*, 21 Cal.3d 779, 582 P.2d 96, 148 Cal.Rptr. 9 (1978); *In re Marriage of Fithian*, 10 Cal.3d 592, 517

P.2d 449, 111 Cal.Rptr. 369 (1974); Cal. Civ.Code § 164 (West). The California court awarded Mrs. Erbe forty-one and one-half percent of Mr. Eady's monthly military retirement benefits. Mr. Eady served in the Air Force for two hundred sixty-one months and the parties were married for two hundred seventeen months; in other words they were married during eighty-three percent of the time that he served in the Air Force. Thus, eighty-three percent of the retirement benefits were earned during the marriage and one-half of this amount was awarded to Mrs. Erbe.

Appellee says, however, that the trial court construed the California judgment to mean that the provision for the wife to receive a part of the husband's military retirement benefits was a part of the periodic alimony award and was not a part of the community property

award. The Alabama trial court did so interpret the California judgment.

By considering the form of the California decree to help it decide whether the retirement benefits were community property or spousal support, *i.e.* that the paragraph relating to retirement benefits was located right after the spousal support paragraph and was not listed in the paragraph specifically providing for the disposition of the other community property, the trial court obviously concluded that the California decree was uncertain and, as such, needed interpretation.

[2] If there is uncertainty in a judgment the court must construe it so as to express the intent of the trial judge, which intent can be derived from the provisions of the judgment. *Price v. Price*, 360 So.2d 340 (Ala.Civ.App. 1978).

[3] Notwithstanding the form of the California decree, the law of California requires military retirement benefits to be awarded as community property where vested, and the benefits were vested in the case at bar. Therefore, the trial court was bound to treat the retirement benefits provision as an award of community property. Furthermore, there is nothing in the California decree to suggest that the retirement benefits provision should be treated other than as an award community property.

The spousal support provision, which preceded the retirement benefits provision, clearly spelled out how much Mrs. Erbe was to receive each month and for how long she was to receive it. Nothing remained to be said about spousal support.

The succeeding paragraph to the retirement benefits provision spelled out

how certain other community property was to be divided, and there was no indication that this paragraph was dealing with all of the parties' community property to the exclusion of the military retirement benefits.

The award of a portion of Mr. Eady's military retirement benefits to Mrs. Erbe was a division of a part of the parties' community property and such award is entitled to enforcement in this state.

[4] After judgment was rendered in the Alabama trial court but before the matter was submitted to this court for decision, the United States Supreme Court, in the case of *McCarty v. McCarty*, _____ U.S. ____, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981), held that California could not treat military retirement benefits as community property. Mr. *Eady says that

[*939]

even if we conclude that the Alabama

trial court erred in not treating his retirement benefits as community property, we are now precluded from so holding and thus from enforcing the California decree. We disagree.

A careful reading of the *McCarty* decision fails to reveal an intent on the part of the court to have its decision enforced retrospectively. Consequently, the effect of *McCarty* on the present litigation will be decided on the basis of the ruling case law of Alabama.[1]

[5] It has been established that where rights to property have become vested, subsequent decisions of the court overruling former decisions establishing

---

[1] The result of the instant appeal would be the same if decided on the basis of the ruling case law of California. *See In re Marriage of Brown*, 15 Cal.3d 838, 544 P.2d 561, 126 Cal. Rptr. 633, (1976).

those rights will not be given retroactive effect. *Farrior v. New England Mortgage Security Co.*, 92 Ala. 176, 9 So. 532 (1890); 10 A.L.R.3d 1371.

In the case at bar Mrs. Erbe's property rights in Mr. Eady's military retirement benefits vested when the California court finally awarded those benefits to here in 1975. Hence, the *McCarty* case would have no effect on that portion of Mr. Eady's retirement benefits due Mrs. Erbe at the time this case was heard in the Alabama trial court.

REVERSED AND REMANDED.

WRIGHT, P. J., and HOLMES, J., concur.

Appendix

81-1739

Supreme Court, U.S.
FILED
MAR 18 1982
ALEXANDER L. STEVAS
CLERK

NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GEORGE L. EADY,
Petitioner

v.

YUKIKO ERBE
Respondent.

APPENDICES B THROUGH H TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS OF ALABAMA

WILLIAM HARVEY ELROD, JR.
205 Holly St., N.E.
Decatur, AL 35601
(Tel.No.[205]3552644).

Counsel of record for Petitioner

RALPH E. SLATE

Attorney for Petitioner

O. Davis Enterprises, 2115 Whitesburg Dr., S.E.
Huntsville, AL 35801

APPENDICES B THROUGH H

B: TRIAL COURT'S ORDER AND FINDINGS;

C: JUDGMENT BELOW AND ORDER ON RE-HEARING;

D: DISCRETIONARY REVIEW BY HIGHEST STATE COURT DENIED;

E: RAISING OF FEDERAL QUESTION;

F: COURSE OF PROCEEDINGS IN STATE COURTS;

G: FORMULATION OF CALIFORNIA DECREE;

H: CONST. PROVS., STATS. AND RULES INVOLVED.

APPENDIX B1

IN THE CIRCUIT COURT FOR LAWRENCE COUNTY, ALABAMA.

YUKIKO ERBE,)
Plaintiff,)
VS.) CIVIL ACTION NO. CV-80-90
GEORGE L. EADY,)
Defendant.)

ORDER

This matter submitted to the Court on the original complaint as amended by the plaintiff on the 1st day of October, 1980, and on the answer of the defendant and the cross-claim [sic] of the defendant and the answer [sic] to the cross-claim [sic] by the defendant-plaintiff.

The Court having scheduled the same and having taken the evidence in open Court finds as follows:

That the Final Judgment of Divorce entered by the Superior Court of Califor-

nia, County of Santa Barbara, dissolving the bonds of matrimony between George L. Eady and Yukiko Erbe, as shown by plaintiff's Exhibit I, is entitled to full faith and credit under the Laws of the State of Alabama as required in the Constitution of the Unite[d] States.

That this cause styled on the general basis of a Bill for Declaratory Judgment shows that the plaintiff, Yukiko Erbe, is an individual over the age of twenty-one (21) years residing in Newbury Park, California. That the defendant, George L. Eady, is an individual over the age of twenty-one (21) years residing in Trinity, Alabama.

That on or about, to-wit: October 18, 1974, they were living in the State of California as man and wife when an Interlocutory Judgment of Dissolution of Marriage was entered in the Superior Court of

California, County of Santa Barbara, declaring that the parties thereto were entitled to have their marriage dissolved.

The Court further finds from the records from the Court in California that was [sic] introduced that Final Judgment of Dissolution of Marriage was entered on January 8, 1975, and made binding all the provisions of the Interlocutory Judgment which was entered on October 18, 1974.

The Court further finds as a matter of fact and law that the Final Judgment of Divorce of the Superior Court of the State of California has not been modified by any Court in the State of California or by any other Court in the United States.

The Court finds that the issue here between the plaintiff and defendant have [sic] to do with certain awards that were made in the Final Decree of Dissolution

of Marriage in the State of California, having to do with the retirement income at present being drawn by the defendant, George L. Eady.

The Court, for the purpose of this Order, would make the Interlocutory Judgment of Dissolution of Marriage entered on the 18th day of October, 1974, and as made final on January 8, 1975, as a part of this Judgment by reference and would incorporate the same therein as though it had been written out fully and would refer to it as "Exhibit A to this Judgment".

The pertinent parts the Court finds therein have to do with the award of what is called in the issuing state as spousal support and community property. The Court finds pertinent sections to be as follows:

> The Court also orders that petitioner shall pay to respondent, as for spousal support, the sum of $1.00

per month, commencing September 1, 1974, and continuing monthly thereafter until respondent dies or remarries or until further order of the Court or until respondent remarries, whichever shall first occur, but in no event beyond September 1, 1984. Respondent waives any and all rights to spousal support from and after that date.

The Court also orders that petitioner shall pay the respondent an amount equal to forty-one and one-half (41.5%) percent of his gross monthly military retirement payable on or before the first day of each month, commencing September 1, 1974. This amount presently is in the amount of $178.03 per month.

The Court also orders that the community property of the parties

is distributed as follows;

To the petitioner as petitioner's sole and separate property:

1. House and lot located at 4170 Polaris Avenue, Vandenberg Village, Lompoc, California.

2. The household furniture, furnishings and appliances located in the home at 4170 Polaris Avenue.

3. The aircraft maintenance tools and other tools; and

4. The 1972 Toyota automobile, California license No. 064FKV, subject to the encumbrance thereon.

To the respondent as respondent's sole and separate property:

1. The Singer sewing machine, two knitting machines, television-stereo console and a Japanese wall clock, subject to the encumbrance on the on the Singer sewing machine; and

2. The 1968 Ford Thunderbird automobile, California license No. WQH 888.

The court further finds from the evidence in this matter that the plaintiff, Yukiko Erbe, married Bob Erbe on May 31, 1975. The Court further finds that the last military retirement check that the defendant forwarded to the plaintiff, Yukiko Erbe, was for June, 1975.

The Court, after consideration of the foregoing facts and circumstances, is of the opinion that the military retirement pay hereinabove made reference to was not considered by the California Judge to constitute community property as evidenced by the fact that he did not list it in the Interlocutory Dissolution of Marriage as such and that he referred to it and treated it as spousal support and that under the terms and conditions of the Divorce

Decree as made final, when Yukiko Erbe married Bob Erbe on May 31, 1975, the legal obligation of George L. Eady to provice spousal support had therefore been fully met and that he had no obligation to continue to meet said payment.

Based on the foregoing, the Court is of the opinion that the plaintiff's petition for relief must be denied in all respects on the ground that she has no legal claim to the relief sought in the petition made the basis of this cause of action.

It is FURTHER ORDERED that the plaintiff, Yukiko Erbe, shall pay the costs for this proceeding, all for the collection of which execution may issue.

DONE AND ORDERED this 31st day of December, 1930.

s/ Billy C. Burney
BILLY C. BURNEY, Circuit Judge

STATE OF ALABAMA, LAWRENCE COUNTY

I, LARRY SMITH, Clerk OF THE CIRCUIT COURT FOR LAWRENCE COUNTY, ALABAMA, DO HEREBY CERTIFY THAT THE FOREGOING IS A CORRECT COPY OF THE ORIGINAL Order IN THE ABOVE STATED CAUSE, AS THE SAME APPEARS ON FILE AND ON RECORD IN MY OFFICE.

WITNESS MY HAND AND SEAL THIS THE 5th DAY OF March, 1982.

s/ Larry Smith

FILED

SUPERIOR COURT

OCT 18, 1974

HOWARD C. MENZEL, County Clerk

By s/ Debra L. MacKenzie
Deputy Clerk

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF SANTA BARBARA

In re the marriage of CASE NO.

Petitioner: GEORGE L. EADY SM 14547

and

Respondent: YUKIKO EADY

INTERLOCUTORY JUDGMENT OF DISSOLUTION OF MARRIAGE

This proceeding was heard on Aug. 14, 1974 before the Honorable Robert L. Trapp Department No. SM II.

The Court acquired jurisdiction of the respondent on May 9, 1974 by:

* * * *

Exhibit "A" [to judgment of Alabama trial court]

X Respondent on that date having appeared.

The court orders that an interlocutory judgment be entered declaring that the parties are entitled to have their marriage dissolved. This interlocutory judgment does not constitute a final dissolution of marriage and the parties are still married and will be, and neither party may remarry, until a final judgment of dissolution is entered.

The court also orders that, unless both parties file their consent to a dismissal of this proceeding, a final judgment of dissolution be entered upon proper application of either party or on the court's own motion after the expiration of at least six months from the date the court acquired jurisdiction of the respondent. The final judgment shall include such other and further relief as may be necessary to a complete disposition of this proceeding, but entry of the final

judgment shall not deprive this court of its jurisdiction over any matter expressly reserved to it in this or the final judgment until a final disposition is made of each such matter.

The court also orders that the custody of the minor children of the parties, namely, VIRGINIA EADY, female, born July 15, 1957, age 17 years, and PATRICIA EADY, female, born January 21, 1959, age 15 years, is awarded to petitioner subject to the right of reasonable visitation by respondent.

The court also orders that petitioner shall pay to respondent, as and for spousal support, the sum of $1.00 per month, commencing September 1, 1974, and continuing monthly thereafter until respondent dies or remarries or until further order of this court or until repondent remarries, whichever shall first occur, but in no

event beyond September 1, 1984. Respondent waives any and all rights to spousal support from and after that date.

The court also orders that petitioner shall pay to respondent an amount equal to forty-one and one-half (41.5%) percent of his gross monthly military retirement payable on or before the first day of each month, commencing September 1, 1974. This amount presently is in the amount of $178.03 per month.

The court also orders that the community property of the parties is distributed as follows:

To the petitioner as petitioner's sole and separate property:

1. House and lot located at 4170 Polaris Avenue, Vandenberg Village, Lompoc, California;

2. The household furniture, furnishings and appliances located in

the home at 4170 Polaris Avenue;

3. The aircraft maintenance tools and other tools; and

4. The 1972 Toyota automobile, California license No. 064FKV, subject to the encumbrance thereon.

To the respondent as respondent's sole and separate property:

1. The Singer sewing machine, two knitting machines, television-stereo console and a Japanese wall clock, subject to the encumbrance on the Singer sewing machine; and

2. The 1968 Ford Thunderbird automobile, California license No. WOH 888.

The court also orders that petitioner shall sign and execute a promissory note in the principal amount of $8,169.00, with principal and interest payments in the amount of $72.00 per month, commencing

September 1, 1974. Note shall carry interest at the rate of seven (7%) percent per annum on the unpaid balance. This note shall be secured by a Deed of Trust upon the home of the parties located at 4170 Polaris Avenue, Vandenberg Village, Lompoc, California. The entire unpaid balance of said note shall be due and payable on September 1, 1979.

The court also orders that petitioner shall pay and discharge the indebtedness on the MasterCharge account and hold respondent free and harmless therefrom.

The court also orders that the previous order regarding payment of respondent's attorney fees is rescinded and each party shall pay his or her own attorney's fees and court costs incurred in this action.

DATED: OCT 18 1974

s/ Robert L. Trapp
JUDGE OF THE SUPERIOR COURT

APPROVED AS TO FORM ONLY:

s/ James D. Finley
JAMES D. FINLEY
Attorney for Petitioner

s/ Eugene L. Huseman
EUGENE L. HUSEMAN
Attorney for Respondent

STATE OF CALIFORNIA
COUNTY OF SANTA BARBARA

I, HOWARD C. MENZEL, County Clerk and ex-officio Clerk of the Superior Court, do hereby certify the foregoing to be a full, true and correct copy of the original on file in my office, and that I have carefully compared the same with the original. In Witness Whereof, I have hereunto set my hand and affixed the seal of the Superior Court this 22 day of July A.D., 1980.

HOWARD C. MENZEL, County Clerk

BY s/ S. Strebel
Deputy Clerk

FILED

SUPERIOR COURT

JAN - 8 1975

HOWARD C. MENZEL, County Clerk

BY s/ S. R. Slamar
Duputy Clerk

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF SANTA BARBARA

In re the marriage of CASE NUMBER SM 14547

Petitioner: GEORGE L.

EADY FINAL JUDGMENT

and (MARRIAGE) OF

DISSOLUTION

Respondent: YUKIKO EADY

The court acquired jurisdiction of the respondent on May 9, 1974 by:

(Date)

* * * *

xx Service of process on that date and respondent having appeared.

* * * *

x pursuant to x Civil Code Section 4506(1)

or __ Civil Code Section 4506(2), a Final Judgment of Dissolution be entered, and that all of the provisions of the interlocutory judgment, which was entered on Oct. 18, 1974, except as otherwise set out below, be made binding the same as if set forth in full, and that the parties be restored to the status of unmarried persons.

s/ Marion A. Smith
Judge of the Superior Court

APPENDIX C1

[IN THE COURT OF CIVIL APPEALS OF ALABAMA]

Civ. 2852

Yukiko Erbe *

v. * LAWRENCE CIRCUIT COURT

George L. Eady *

This cause having been submitted, IT IS CONSIDERED, ORDERED AND ADJUDGED that the judgment of the Circuit Court be and the same is hereby reversed and annulled and the cause is remanded to said Court for further proceedings therein.

IT IS FURTHER ORDERED that the appellee pay the costs accruing on said appeal in this Court, $50.00, and in the Court below, by paying such total sum to the clerk of the trial court.

Opinion by Bradley, J.

Wright, P.J. and Holmes, J. concur.

APPENDIX C2

[IN THE COURT OF CIVIL APPEALS OF ALABAMA]

WEDNESDAY, SEPTEMBER 23, 1981

* * * * * * * * * * * * * * * *

APPLICATIONS FOR REHEARING OVERRULED

* * * * * * * *

Civ. 2852 Yukiko Erbe v. George L. Eady.

APPENDIX D1

IN THE SUPREME COURT OF ALABAMA

GEORGE EADY,

APPELLANT

VS.

YUKIKO ERBE,

APPELLEE,

CIRCUIT COURT OF LAWRENCE COUNTY, ALABAMA,

SC NO. 81-3

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF ALABAMA:

Comes your petitioner, George Eady, who was the defendant in the trial Court and the appellee in the Court of Civil Appeals of Alabama, and petitions this Court for a Writ of Certiorari to issue to the Court of Civil Appeals of the State of Alabama in the above entitled cause under Rule 39, ARAP, and shows as follows:

1. The petitioner was the defendant in the trial Court, Lawrence County, Alabama. The plaintiff, Yukiko Erbe,

appealed the case to the Court of Civil Appeals of Alabama. The Court of Civil Appeals of the State of Alabama reversed the trial Court's judgment on the 26th day of August, 1981. The Court of Civil Appeals of Alabama denied the application of George Eady for a rehearing on said case on September 23, 1981.

2. A copy of the opinion of the Alabama Court of Civil Appeals[1] is attached to this petition which shows the court of Civil Appeals case to be No. 2852.

3. Petitioner submits in this petition the following questions: Does the decision of the Alabama Court of Civil Appeals follow the law as set out by the Supreme Court of the United States? Does the Court of Civil Appeals of Alabama's decision follow the law as set out by

---

[1] [App. A1, ante.]

the Supreme Court of Alabama? Petitioner alleges that the decision of the Alabama Court of Civil Appeals is in contradiction with the Law of the State of Alabama as established by this Supreme Court of Alabama and is in conflict with and contrary to the Law of the United States of America as established by the Supreme Court of the United States.

Petitioner respectfully requests that after a preliminary examination, the Writ of Certiorari be granted and that this Court proceed under its rules to review the matter complained of and reverse the judgment of the Court of Civil Appeals of Alabama and for such other relief as the petitioner may be entitled.

Petitioner alleges that the decision of the Court of Civil Appeals of Alabama involves construing a controlling provision of the Federal Constitution, and that

such has not been construed in this state before. Further, that this case involves a material question requiring decision as being one of first impression in Alabama. Further, that the decision of the Court of Civil Appeals of Alabama is in conflict with prior decision of the Supreme Court of Alabama, or has misapplied the law as previously set out by the Supreme Court of Alabama in previous decisions. The Court of Civil Appeals relied heavily on the case of *Farrior vs. New England Mortgage Security Company*, 9 So. 532 (1890)[.]

I certify that I have on this 7th day of October, 1981, served a copy of this petition and a copy of the brief in support of said petition upon Larry Weaver, opposing counsel, by hand delivering a copy of the same to him in person. I further certify that I have mailed a copy of this petition and the support-

ing brief to the Clerk of the Court of Civil Appeals of the State of Alabama by certified mail on this the 7th day of October, 1981.

Submitted by:

s/ Ralph E. Slate
RALPH E. SLATE

Attorney for the Appellant
P. O. Box 1344
Decatur, Alabama 35602
Phone No. 353-7912

APPENDIX D2

DECEMBER 18, 1981

THE STATE OF ALABAMA - JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

OCTOBER TERM 1981-82

81-3

Ex Parte: George Eady

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS

(Re: Yukiko Erbe vs. George L. Eady)

The Petition for Writ of Certiorari to the Court of Civil Appeals being duly submitted to this Court, IT IS CONSIDERED AND ORDERED that the petition be denied. NO COSTS TAXED.

SHORES, J.

TORBERT, C.J., MADDOX, JONES AND BEATTY, JJ., CONCUR.

I, J. O. Sentell, Clerk of the Supreme Court of Alabama, do hereby certify

that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court.

Witness my hand this 16th day of Feb. 1982.

s/ J. O. Sentell

Clerk, Supreme Court of Alabama

APPENDIX D3

[406 So.2d 939 (Ala. 1981)]

Ex parte George EADY.

(Re Yukiko ERBE

v.

George L. EADY).

81-3

Supreme Court of Alabama.

Dec. 18, 1981.

Certiorari to the Court of Civil Appeals, 406 So.2d 936.

SHORES, Justice.

WRIT DENIED---NO OPINION.

TORBERT, C.J. and MADDOX, JONES and BEATTY, JJ., concur.

APPENDIX E1

RALPH E. SLATE

ATTORNEY AT LAW

404 First Federal Building

305 Fourth Avenue, S.E.

DECATUR, ALABAMA 35601

Telephone

(205) 353-7912

Post Office Box 1344

Decatur, Alabama 35602

February 24, 1982

Mr. John H. Wilkerson, Jr.

Clerk of the Alabama Court of Civil Appeals

2600 East South Boulevard

Room 250

Montgomery, Alabama 36116

Re: SC 80-260

Erbe v. Eady

Dear Mr. Wilkerson:

There is a case of Yukiko Erbe vs. George Eady pending in your court having been transferred there from the Supreme Court of Alabama. I am the Appellee in

said case and have filed my brief and argument already. Would you please accept this letter as an amendment to my brief and as a motion to allow such amendment for the matters and things set out hereinafter.

Mr. Eady was formerly married to Mrs. Erbe and they divorced each other in California in 1975. He was granted the children and she was granted one dollar per month espousal support, a division of the community property and she was further awarded 42% of his military retirement pay for life. He never paid any of this retirement pay after she married, nor was there any espousal support paid. He came to Alabama and after several years she filed suit against him claiming a judgment against him for the delinquent military retirement pay. Judge Billy C. Burney in Lawrence County decided the case, holding that the award

of military retirement pay in this particular case was alimony which would cease under the decree at the time of her remarriage. Mrs. Erbe's contention was that the award of military retirement pay was a division of community property and her remarriage had nothing to do with the retirement pay. This case is now on appeal to the Alabama Court of Civil Appeals and I am of the opinion that the issues prior to June 28, 1981, would be decided on the Court of Appeals decision as to whether it was community property or alimony.

On the 28th day of June, 1981, in the case of Richard John McCarty vs. Patricia Ann McCarty, the United States Supreme Court decided in this case, a California case, that federal military retirement pay was not and is not subject to the community property laws of the State of California. Thus our posture now is that if the award was alimony, Mrs. Erbe's

remarriage cured it. If the award was community property, Mr. Eady would owe her nothing because under the above quoted United States Supreme Court case the Court held six to three, that military retirement pay is not community property and not subject to the community property laws of any state, specifically California. The case is so new that it has not come out in the law books. I called the Clerk of the United States Supreme Court and they sent me a full copy of the decree. I am taking the liberty of xeroxing three copies of that decree to accompany this letter and am sending a copy thereof to opposing counsel.

It is our position, and we now contend the same, that any judgment rendered in California for an award of a portion of the military retirement pay is a void judgment and cannot be enforced because

of this decision of the Supreme Court of the United States holding that California cannot make such an award. We will argue this point further at oral argument on the 29th day of July when we are to appear before the court.

It will be our contention that it is the long standing law that an Alabama Court can amend or alter a decree or judgment from a foreign court if that foreign court could amend or alter their own judgment. It has long been held that a foreign court can amend its own judgment as to alimony, support, child custody and that therefore Alabama would have the same right to amend a foreign court's judgment, or to refuse to give full faith and credit to it. Thus our position will be that under this decision, the California courts could not enforce this decree, could not award a portion of the military retirement pay,

and therefore Alabama is precluded from enforcing the decree from that state or collecting any money based on a judgment rendered under that law which the Supreme Court of the United States declared null and void, as being in conflict with the Supremacy Clause of the United States Constitution.

I took the liberty of calling your office and inquiring as to the best method of bringing this new development to the attention of the Court and the lady in your office said she believed this would be appropriate. Obviously we could not have argued this in our original brief because the decision had not been rendered at that time.

Thank you for your consideration, I remain,

Sincerely yours,

s/ Ralph E. Slate.
Ralph E. Slate

RES/ek

Enclosures [omitted in this appendix.]

I hereby certify that I have mailed a copy of the above and foregoing letter and a copy of the above mentioned Supreme Court decision to Larry Weaver, opposing attorney, by United States Mail and postage prepaid, properly addressed, on this the 10th day of July, 1981.

s/ Ralph E. Slate

Ralph E. Slate, Attorney

APPENDIX E2

EYSTER, EYSTER, KEY & TUBB

LAW OFFICES

FIRST SOUTHERN BUILDING

P. O. BOX 1607

DECATUR, ALABAMA 35602

JOHN C. EYSTER 1863-1926

CHAS. H. EYSTER, SR. 1888-1964

TELEPHONE

(205)353-6761

WM. B. EYSTER

JOHN C. EYSTER

JOHN S. KEY

J. GLYNN TUBB

July 15, 1981

LARRY C. WEAVER

NICHOLAS B. ROTH

Mr. John H. Wilkerson, Jr.
Clerk of the Alabama Court of Civil Appeals
2600 East South Boulevard
Room 250
Montgomery, Alabama 36116

Re: Erbe vs. Eady

SC 80-260

Dear Mr. Wilkerson:

With regard to the above captioned case, the defendant-appellee (hereinafter defendant) has filed a motion to allow amendment to his brief and has filed an amendment to his brief. While the plaintiff-appellant (hereinafter plaintiff) is opposed to any such amendment by the defendant, the plaintiff would ask that the following be accepted as an amendment to her brief in the event that defendant is allowed to so amend:

AMENDMENT TO PLAINTIFF-APPELLANT'S BRIEF

The defendant amends his brief to bring to light a case just recently decided by the Supreme Court of the United States, styled *McCarty v. McCarty* (June, 1981). However, the plaintiff contends that the said case has no application to the instant case now before the Court of

Civil Appeals. In support of her position, the plaintiff contends that the principle of res judicata as set forth in *Trimble v. Branco Products, Inc.*,Ala., 351 So.2d 1357 (1977) is applicable. In *Trimble*, supra, the Supreme Court of Alabama stated:

> "At no point in the pleadings, the pretrial order or elsewhere in the record has the plaintiff attempted to assert a claim for relief against Mitchell Motors based upon a theory of strict liability in tort or the Alabama Extended Manufacturer's Liability Doctrine which, or course, was not stated until after this case was tried. *Atkins v. American Motors Corp.*, supra; *Casrell v. Altec Industries, Inc.*, supra.
>
> . . . . . .
>
> The principle of res judicata is predicated upon the doctrine that litigation must come to an end. Any

> issue which has been adjudicated, or which could have been adjudicated, is by that doctrine barred from further litigation. *Heiser v. Woodruff*, 327 U.S. 726, 66 S.Ct. 853, 90 L.Ed. 970 (1946). That principle, so fundamental to our jurisprudence, would be violated if the law as it evolves to meet new conditions of society, were made retroactive to re-open, for another trial, matters laid to rest under theories of liability existing at the time they were tried."

351 So.2d at P. 1362.

The plaintiff contends that if the *McCarty* case was applied in the instant case, it would require the reopening of thousands of cases decided by the California courts and other courts. It would necessitate the redivision of community property, when, as in the instant case,

the community property has been long since disposed of.

In the trial of the instant case, the plaintiff introduced into evidence the law (statutory law and case law) of the State of California which went unopposed by the defendant. The defendant did not cite nor introduce into evidence one single case which was in opposition to the law of California as stated, set forth, and introduced by the plaintiff. The issue before the Court of Civil Appeals is whether the trial court properly decided that the pertinent provision in the California divorce decree constituted alimony rather than community property. The defendant, in his primary brief and in his reply brief, argues that clearly the trial court erred. The issue on appeal should be limited to that question. If the defendant should be allowed to rely on

the principles espoused in *McCarty*, it should be because he appealed the decision of the trial court in California in his original divorce proceeding -- not now.

Finally, the plaintiff contends that the *McCarty* case would not be applicable even if it were to be considered on this appeal. In *McCarty*, the California court ordered that military retirement benefits be paid pursuant to a "contested" divorce. In the instant case, the plaintiff and defendant stipulated the division of property which the California court simply incorporated in its decree. (See R.57-62) The defendant should not now be allowed to "recind" his "contractual" obligations based on an evolvement of the law.

For the reasons set forth, the plaintiff respectfully requests that this case be remanded for judgment to be entered in favor of the plaintiff.

EYSTER, EYSTER, KEY & TUBB

BY: s/Larry Weaver

Attorneys for Plaintiff

P. O. Box 1607

Decatur, Alabama 35602

CERTIFICATE OF SERVICE

I do hereby certify that I have on this the 16th day of July, 1981, served a copy of the foregoing on counsel for all parties to this proceeding by mailing the same by United States mail properly addressed and first class postage prepaid.

s/ Larry C. Weaver

OF COUNSEL

APPENDIX E3

IN THE COURT OF CIVIL APPEALS OF ALABAMA

YUKIKO ERBE,) COURT OF CIVIL APPEALS

APPELLANT,)

VS.) CIV. 2852

GEORGE L. EADY,)

APPELLEE)

APPLICATION FOR REHEARING

Now comes George L. Eady, the Appellee in the above styled cause, and moves this Honorable Court to grant unto your Appellee a rehearing in said cause, and to reverse, revise and hold for naught its judgment and opinion rendered on August 26, 1981, wherein the judgment of the Circuit Court of Lawrence County, Alabama, was reversed. Further, Appellee respectfully moves this Honorable Court to enter an order and judgment affirming the judgment rendered by the Circuit Court of Lawrence County, Alabama.

Submitted herewith is Appellee's brief and argument in support of this Application for Rehearing.

Respectfully submitted,

s/ Ralph E. Slate

RALPH E. SLATE

ATTORNEY FOR THE APPELLEE

P. O. Box 1344

Decatur, Alabama 35602

IN THE COURT OF CIVIL APPEALS OF ALABAMA

YUKIKO ERBE,	)	COURT OF CIVIL APPEALS
APPELLANT,	)	
VS.	)	CIV. 2852
GEORGE L. EADY,	)	
APPELLEE	)	

BRIEF AND ARGUMENT

IN SUPPORT OF

APPLICATION FOR REHEARING

Submitted by:

Ralph E. Slate

Attorney for Appellee

P. O. Box 1344

Decatur, Alabama 35602

353-7912

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* * * * * * * *

ISSUES PRESENTED AND ARGUMENT

* * * * * * * *

**** The Court of Civil Appeals ... held the trial court to be wrong, and that in fact this was an award of community property.

The Appellee then contended that if it in fact was an award of community property, it was void and illegal as held in the case of *McCarty vs. McCarty* No. 80-5 (U.S. June 26, 1981). This case by the Supreme Court of the United States clearly held that the California statute and cases holding retired military pay as community property was unconstitutional and in conflict with the Federal Supremency [sic] Clause, unconstitutional and unenforc[e]able. Thus if it was an award of community property, it was an illegal award and should not be enforced by the Appellant herein.

The Alabama Court of Civil Appeals held that *McCarty vs. McCarty* did not apply to any rights of the parties acquired prior to the Supreme Court decision in the McCarty case. This is and was an erroneous conclusion of the Court of Civil Appeals, in that the McCarty case commenced by divorce in 1976 in California and the Erbe vs. Eady case commenced by divorce in 1975. For the McCarty case the Supreme Court of the United States said that the ex-spouse commencing in 1976 had no rights to the military retirement pay of her ex-husband. It appears that the same would apply to Mr. Eady in 1975 and 1976 also. This is not a case by Mr. Eady against Mrs. Erbe seeking to recover money already paid to Mrs. Erbe, thus it does not attempt to take property from her which she already has and used. She never received any of this money after 1975 and is now trying to

get it and enforce her decree, which is in clear violation of McCarty. This Court stated that the McCarty decision fails to reveal an intent on the part of the Court to have its decision enforced retrospectively. There is no such thing as enforcing it retrospectively as the McCarty decision clearly states that no rights ever existed for the ex-spouse to treat retired military pay as community property. Thus the Supreme Court of the United States has said that Mrs. Erbe never had any rights to Mr. Eady's retirement pay.

The Court in its decision quotes the case of *Farrior vs. New England Mortgage Company*, 9 So. 532 (1980): A careful reading of the Farrior case discloses that it involves contract rights acquired by New England Mortgage Security Company, under existing case law as propounded by the Supreme Court of Alabama. That case

correctly says that any rights to property contracted for under existing law will not be disturbed by subsequent decisions of the court to the contrary. There are no contract rights in the Eady vs. Erbe case and no voluntary entering into any contractual relation by Mr. Eady with Mrs. Erbe. It was imposed upon him against his will, by a California court, based on California law which McCarty says is and was unconstitutional. There are no contractual rights involved in this case as there was in the Farrior case. Nor does the present case involve a decision by a Supreme Court of one State overruling decisions by the same Court previously made. The California court has not said that their statute is unconstitutional, but the Supreme Court of the United States has said those things are in conflict with Federal Law and unconstitutional. Hence if the Supreme Court of the

United States has said that under Federal Law the right to a portion of the military retirement pay under Community Property Law is unconstitutional, then it has been unconstitutional at all times.

CONCLUSION

The Appellee earnestly urges this Court to grant a rehearing on this case, reverse its decision, and affirm the decision of the Circuit Court of Lawrence County, Alabama. The decisions of the Supreme Court of the United States are the Law of the Land, be they tasteful or distasteful, and are to be followed.

Respectfully submitted,

s/ Ralph E. Slate

RALPH E. SLATE
ATTORNEY FOR THE APPELLEE
P. O. Box 1344
Decatur, Alabama 35602

CERTIFICATE

I hereby certify that I have hand carried a copy of this Application for Rehearing, together with a copy of my brief and argument in support thereof, to the Honorable Larry Weaver, opposing attorney, on this the 4th day of September, 1981.

s/ Ralph E. Slate

RALPH E. SLATE

ATTORNEY FOR THE

APPELLEE

APPENDIX E4

THE COURT OF CIVIL APPEALS OF ALABAMA

YUKIKO ERBE,)

APPELLANT,)

VS.) CIV. 2852

GEORGE L. EADY,)

APPELLEE.)

MOTION TO DISMISS APPLICATION FOR REHEARING

The plaintiff, Yukiko Erbe, moves the court as follows:

1. To dismiss the Application for Rehearing for reason that the paper filed by George L. Eady in support of his application cannot be characterized as a brief and under Rule 40, Alabama Rules of Appellate Procedure, no party can, as a matter of right, apply for a rehearing unless brief was filed with the clerk as provided by the rules.

EYSTER, EYSTER, KEY & TUBB

BY: s/ Larry Weaver

Attorneys for Yukiko Erbe

P. O. Box 1607

Decatur, Alabama 35602

THE COURT OF CIVIL APPEALS

OF ALABAMA

RE: CIV. 2852

YUKIKO ERBE,

APPELLANT,

VS.

GEORGE L. EADY,

APPELLEE.

APPEAL FROM THE CIRCUIT

COURT OF LAWRENCE COUNTY, ALABAMA

BRIEF FOR APPELLANT IN SUPPORT OF MOTION TO DISMISS APPLICATION FOR REHEARING AND ALTERNATIVELY, IN OPPOSITION TO APPLICATION FOR REHEARING.

LARRY C. WEAVER

EYSTER, EYSTER, KEY & TUBB

P. O. BOX 1607

DECATUR, ALABAMA 35602

* * * * * * * * * * * *

ISSUE II.

THE DEFENDANT, GEORGE L. EADY, IS NOT ENTITLED TO A REHEARING.

Farrior v. New England Mortgage Security Company 92 Ala.176, 9 So. 532 (1890).

A R G U M E N T

The issues on the application for rehearing concern whether the application for rehearing filed by the defendant, George L. Eady is sufficient and alternatively, whether the defendant, George L. Eady, is, on the merits, entitled to a rehearing. The two issues are presented and argued separately.....

* * * * * * * * * * * *

II.

THE DEFENDANT, GEORGE L. EADY, IS NOT ENTITLED TO A REHEARING.

The plaintiff, Yukiko Erbe, contends that the opinion of the Court of Civil Appeals of Alabama is correct and that

the defendant is not entitled to a rehearing. The Court of Civil Appeals considered the recent Supreme Court case of *McCarty v. McCarty*, No. 80-5(U.S. June 26, 1981), and held that the said United States Supreme Court case did not apply retrospectively. In support of its holding, the court cited *Farrior v. New England Mortgage Security Company* 92 Ala.176, 9 So.532 (1890), wherein it was stated:

> "The question presented for consideration is the effect of a later decision upon contracts and rights of property acquired under the statute, as construed by the former decisions, and while those decisions were in force.
>
> . . . . .
>
> 'The quieting of litigation; the public peace and repose; respect for judicial administration of the law, and confidence in its reasonable certainty, stability, and consistency; and all considerations of public policy, --call for permanently upholding acts done, contracts executed, rights vested, and titles to property acquired on the faith of decisions of the court of last resort.' Persons contracting are presumed to know the existing law, but neither they nor

their legal advisers are expected to know the law better than the courts, or to know what the law will be at some future day. Any principal [sic] or rule which deprives a person of property acquired by him, or the benefit of a contract entered into, in reliance upon and strict compliance with the law in all respects as interpreted and promulgated by the court of last resort at the time of the transaction, and no fault can be imputed to him unless it be a fault not to foresee and provide against future alterations in the construction of the law, must be radically wrong. Such a principal [sic] or rule of law would clog business transactions, unsettle titles, and destroy all confidence in the decisions of the Supreme Court of the state. We hold the doctrine to be sound and firmly established by the decisions of the Supreme Court of the United States, and enunciated by many imminent text writers, that rights to property, and the benefits of investments acquired by contract, in reliance upon a statute as construed by the Supreme Court of the state, and which were valid contracts, under the statute as thus interpreted, when the contract or investments were made, cannot be annulled or divested by subsequent decisions of the same court overruling the former decisions;" [emphasis added.]

92 Ala. 176 at pages 179, 181.

The defendant contends that *Farrior*

supra, applies only to contract rights and, therefore, is inapplicable to the instant case. However, the *Farrior* case continually refers to the "rights of property acquired" and "rights vested, and titles to property". In addition, the divorce decree made the subject of this action was based upon a stipulation entered into by the parties. The argument presented by the defendant is completely without basis or foundation in fact or law.

In addition, the defendnat contends that the fact that the commencment of the *McCarty* case in 1976 in some way prevents the principle expoused in the *Farrior* case from operating. However, it is self evident under the principle in *Farrior*, supra, that a case filed December 1, 1976 and finally decided on June 26, 1981 would in no way affect a stipulation of property rights entered into on October 18, 1974, and embodied and finalized by the Superior

Court of California through incorporation in a judgment of divorce on January 8, 1975. The above argument presented by the defendant is completely without basis or foundation in fact or law.

C O N C L U S I O N

It is submitted that the opinion of the Court of Civil Appeals of Alabama is without error, that the Application for Rehearing of the defendant should be dismissed and, alternatively, on the merits, that the defendant is not entitled to a rehearing.

Respectfully submitted,

EYSTER, EYSTER, KEY & TUBB

BY: s/ Larry Weaver

Attorneys for Yukiko Erbe

P. O. Box 1607

Decatur, Alabama 35602

CERTIFICATE OF SERVICE

I do hereby certify that I have on this the 17th day of September, 1981 served a copy of the foregoing on counsel of record for the Appellee, Ralph Slate, for this proceeding by delivering by hand the same.

s/ Larry Weaver

OF COUNSEL

APPENDIX E5

SUPREME COURT OF ALABAMA

SC NO. [81-3]

GEORGE EADY,

APPELLANT [sic]

VS.

YUKIKO ERBE,

APPELLEE [sic]

PETITION FOR CERTIORARI TO

THE SUPREME COURT OF ALABAMA

BRIEF AND ARGUMENT IN SUPPORT OF

WRIT OF CERTIORARI OF THE APPELLANT [sic]

RALPH E. SLATE

ATTORNEY FOR PETITIONER

P. O. BOX 1344

DECATUR, ALABAMA 35602

PHONE NO. 353-7912

Petitioner requests oral argument.

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* * * *

STATEMENT OF THE CASE

****After the appeal was taken by Yukiko Erbe, but before the matter was argued and submitted to the Court of Civil Appeals of Alabama, the Supreme Court of the United States in a case of *McCarty vs. McCarty*, 80-5, decided June 26, 1981, a copy of said case being furnished with each copy of this brief, decided on a case from California that military retirement pay was not subject to the Community Property Laws of the State of California, had never been such, and that the California Law was pre-empted by the federal law, that it was the separate property of the retired military man, and that federal law precludes a state Court from dividing military retired pay pursuant to any state Community Property Laws. The McCarty case stated further that the

language and history of the statues make it clear the retired pay continued to be the personal entitlement of the retiree. It further said that application of community property principles to military retired pay threatened grave harm to clear and substantial federal interests. That further such division has potential to interfere with the congressional goals of having the military retirement system serve as an encouragement to orderly promotion and a youthful military.

When the present case was decided by the Court of Civil Appeals of Alabama, its decision being dated August 26, 1981, the Court of Civil Appeals held that the trial Court erred in holding this award to be alimony, and that it was in fact an award of property under the Community Property Laws of the State of California . Further, that the case of *McCarty vs. McCarty* had

no bearing on the case here being tried because it was not retroactive.

The Court of Civil Appeals reversed the trial Court of Lawrence County, Alabama, George Eady filed a motion for rehearing, the same was overruled by the Court of Civil Appeals of Alabama on the 23rd day of September, 1981, hence this petition for certiorari.

ISSUES AND ARGUMENT

The Court of Civil Appeals of Alabama ruled that notwithstanding the *McCarty vs. McCarty* case, the wife was entitled to the money under the California decree, and the primary case cited by the Court of Civil Appeals of Alabama was *Farrior vs. New England Mortgage Security Co.*, 9 So. 532. This is a Supreme Court case of the State of Alabama. The case says "After a statute has been settled by judicial construction, the construction becomes so far as

contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment to the law by means of a legislative enactment." The case goes on to discuss the constitutional barrier to legislative enactments impa[i]ring the obligations of contracts. It comments on contracts made on the faith of the earlier decision. The case makes much of quieting title in property. It quotes further saying, "Any principle or rule which deprives a person of property acquired by him, or the benefits of a contract entered into in reliance upon and strict compliance with the law in all respects, etc.," entitles the person to such benefits.

In the instant case, no rights were acquired by Yukiko Erbe under a contract.

No property, such as real estate as the subject of the *Farrior* case, vested in her. She in fact never received the money, thus this is not a suit for the recovery of money by Eady. She received no rights in reliance herself upon the statute or the Court decisions of California. These were conferred upon her as a matter of law in the State of California. There is nothing in the present case smacking of contractual relations or reliance by any person, other than the California Court, on any California Law. Thus the *Farrior* case can be distinguished from the present case and the application of the doctrine and law of the *Farrior* case is wrongfully applied by the Court of Civil Appeals to this case.

This present case also concerns construction of the Federal Constitution and Federal Statutes. The Supreme Court of

the United States in *McCarty vs. McCarty*, a copy of which is attached to this brief,[1] clearly and without question states that California Law and principles of community property as applied to Federal Military retired pay is unconstitutional, does not apply, and is void. The *McCarty* case says that the California Law was preempted by the Federal Law. Further, that it was a law operating in a field wherein there was substantial federal interest. It further entered a field which the federal government clearly says is reserved to the federal government.

An Alabama case of *Oscar Davis vs. Redstone Federal Credit Union*, 401 So.2d 52, holds that the state and federal government has regulation over federal credit unions. However, this Alabama case did

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[1] [Omitted in this appendix.]

recognize that the federal doctrine of pre-emption had its application when both federal and state statutes and regulations seek to operate in the same area or to govern the same activity. Still quoting from the *Redstone Federal Credit Union* case, this Court said pre-emption tradtionally applies in the following circumstances: When state regulation has been expressly prohibited by Congress. (*Rice vs. Santa Fe Elevator Corporation* 331 US, 218 (230) 67 SC 1146 (1152) 91 L. Ed. 2d [sic] 1447 (1947); or when Congress has unmistakably ordained either expressly or implicitly that federal regulations alone will govern an area or activity. (*Florida Lime and Avocado Growers, Inc. vs. Paul*, US, 132 (142) 83 SC 1210 (1217) 10 L. ED 2d 248 (1963)); or when the state regulations either conflict with or create an obstacle to the accomplishment of a valid congres-

sional purpose. (*Hines vs. Davidowitz*, 312 US 52, 61 S Ct 399 85 L. ED. 581 (1941)). The Alabama Courts thus recognize *Hines* case and the *McCarty* case says that the California Statutes and concepts of community property on military retired pay creates an obstacle to the accomplishment of a valid congressional purpose. In fact the majority of the wording in the *McCarty* case makes the decision on the theory that to allow military retired pay to be community property, created an obstacle to the accomplishment of a valid congressional purpose. The United States Supreme Court said in the *Hines* case, "A conflict will be found where compliance with federal and state regulations is an impossibility." As stated in the *Avocado Growers, Inc.* case mentioned above. The *Hines* case says further, "Where the state law stands as an obstacle to the accom-

plishment and execution of the full purpose and objective of Congress."

In the case of *Chesapeake and Ohio Canal Company vs. Western Maryland Railroad Company*, 58 A. 34, the statute changed the law while the case was on appeal. The appellate Court said the law at the time of the appeal decision applied, even though it applied to the right or duty of one of the parties to build a railroad bridge and change the right or duty. In the case of *People vs. Bank of San Luis Obispo*, a California case cited at 112 PH [P.] 866 [(1910)], the Court held that the rule is a judgment based upon a statute which is subsequently repealed will fall on appeal, as the law at the time of the appellate decision is the controlling factor, unless it involves contractual or property rights.

Rule 39, of the Rules of Appellate

Procedure confer upon the Supreme Court of Alabama the right to grant certiorari in five categories, of civil cases.

It is our contention that we fall under category number one, in that the Court of Civil Appeals construed a provision of the Federal Constitution, for the first time in Alabama on this precise type question and that this Court has jurisdiction. We further believe we fall under category number three as this is a question requiring a decision in Alabama, and that it is a case of first impression. We also believe we fall under category number four in that the Court of Appeals has wrongfully applied the Supreme Court Ruling of Alabama in the *Farrior* case cited above, or that the *Farrior* case if it does in fact apply to non-contractual rights, should no longer be the law of the Satate of Alabama.

Without unduly burdening the Court, we earnestly contend that if the *McCarty* case says as we read it, that California or any other state has no right to apply community property laws to the federal retired military pay, that it is solely a federal question, then no such rights ever attached. This is not a claim for money based on a contract or property rights, but is a claim based on a California Law, concerning federal retired military pay, which the Supreme Court of the United States in June, 1981, declared to be unconstitutional and that such law had no application upon military retired pay. McCarty was divorced in 1976 and this case would hold that he owed Mrs. McCarty no part of his military pay from 1976 until the present time. Mr. Eady and Mrs. Erbe were divorced in 1975 and he has paid her no military retirement pay

since May of 1975 and we believe that thus he would owe her none, under a void statute. It is our earnest opinion that if a state statute is unconstitutional and conflicts with a federal statute and it has never been construed by a federal court before, then it has been unconstitutional from its inception and we respectfully ask this Court to grant Writ of Certiorari in order that we may enlarge upon this brief and more fully develop the issues for a full hearing before the Court.

If Certiorari is granted, your petitioner herein respectfully requests the Court to grant us oral argument.

Respectfully Submitted,

s/ Ralph E. Slate

RALPH E. SLATE
Attorney for Petitioner
P. O. Box 1344

Decatur, Alabama 35602

Phone: 353-7912

I hereby certify that I have hand carried a copy of this brief and petition for certiorari to opposing counsel on this the 6th day of October, 1981.

s/ Ralph E. Slate

RALPH E. SLATE

ATTORNEY FOR THE

PETITIONER

I hereby certify that I have mailed a copy of the petition for certiorari together with a copy of the brief in support thereof to the Clerk of the Court of Civil Appeals of Alabama, by certified mail, on this the 7th day of October, 1981.

s/ Ralph E. Slate

RALPH E. SLATE

ATTORNEY FOR PETITIONER

APPENDIX E6

SUPREME COURT OF AL[A]BAMA

RE: SC [81-3]

GEORGE EADY,

PETITIONER

VS.

YUKIKO ERBE,

RESPONDENT

PETITION FOR CERTIORARI TO

THE SUPREME COURT OF ALABAMA

REPLY BRIEF OF RESPONDENT(APPELLANT)

LARRY C. WEAVER

EYSTER, EYSTER, KEY & TUBB

ATTORNEYS FOR RESPONDENT

P. O. BOX 1607

DECATUR, ALABAMA 35602

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STATEMENT OF CASE

* * * * * * * * * * * * * * * *

On August 26, 1981, the Court of Civil Appeals of Alabama, all Justices concurring, reversed and remanded the judgment of the Circuit Court of Lawrence County. The Court of Civil Appeals held that the military retirement provision in the California divorce decree represented a division of community property and that *McCarty v. McCarty*, No. 80-5(U.S. June 26, 1981) was not applicable since the right to the military retirement benefits became vested when the Superior Court of California awarded those benefits to Mrs. Erbe on January 8, 1975.* * * *

* * * * * * * * * * * * * * *

STATEMENT OF ISSUES

ISSUE I.

THE DECISION OF THE COURT OF CIVIL APPEALS IS NOT ONE WHICH INITIALLY HOLDS VALID OR INVALID A CITY ORDINANCE, A STATE STATUTE, OR A FEDERAL STATUTE OR TREATY, OR INITIALLY CONSTRUES A CONTROLLING PROVISION OF THE ALABAMA OR FEDERAL CONSTITUTION.

* * * * * * * * * * * *

A R G U M E N T

ISSUE I.

THE DECISION OF THE COURT OF CIVIL APPEALS IS NOT ONE WHICH INITIALLY HOLDS VALID OR INVALID A CITY ORDINANCE, A STATE STATUTE, OR A FEDERAL STATUTE OR TREATY, OR INITIALLY CONSTRUES A CONTROLLING PROVISION OF THE ALABAMA OR FEDERAL CONSTITUTION.

The only thing which the Court of Civil Appeals of Alabama held invalid was the incorrect construction of the subject California Divorce Decree by the Circuit

Court of Lawrence County. No city ordinance, state statute, federal statute or treaty nor any Alabama or Federal constitution provision is involved in this case.

The suit tried in the Circuit Court of Lawrence County was brought to enforce a provision in a California Divorce Decree wherein Yukiko Erbe was awarded 41.5% of her husband's military retirement benefits. The final divorce decree was based on a stipulation (R.57-62) between the parties entered into on October 18, 1974, and embodied and finalized by the Superior Court of California through incorporation in a judgment of divorce on January 8, 1975. The stipulation was entered into in accordance with the laws of the State of California, which adhered to the concept of community property. When the time for appeal from that final divorce decree expired, those property rights vested.

After almost seven years from the date of the stipulation made in California, *McCarty v. McCarty*, No. 80-5(U.S. June 26, 1981) was decided which forbids the awarding of military retirement benefits by state courts. However, as properly stated by the Court of Civil Appeals in its opinion, where rights to property have become vested, subsequent decisions of the court overruling former decisions establishing those rights will not be given retroactive effect if the law as it evolves to meet new conditions of society were made retroactive to re-open, for another trial, matters stipulated and laid to rest under rules of law existing at the time they were tried.

This notwithstanding, the decision of the Court of Civil Appeals of Alabama cannot be said to be one which holds valid or invalid a city ordinance, a state statute,

or a federal statute or treaty, nor can it be said to initially construe a controlling provision of the Alabama or Federal Constitution. Truely [sic], no ordinance, statute or provision is ever cited or mentioned by respondant.

* * * * * * * * * * * *

CONCLUSION

It is submitted that the instant case is not one which falls within Rule 39(c) of the Alabama Rules of Appellate Procedure and that the petitioner's petition for Writ of Certiorari is due to be denied.

Respectfully submitted,
EYSTER, EYSTER, KEY & TUBB
BY: s/ Larry C. Weaver
Larry C. Weaver
BY: s/ John C. Eyster
Attorneys for Appellant
P. O. Box 1607
Decatur, Alabama 35602
(205)-353-6761

CERTIFICATE OF SERVICE

I do hereby certify that I have on this the 21st day of October, 1981, served a copy of the foregoing on counsel of record for the peitioner, Ralph Slate, for this proceeding by mailing the same by United States mail properly addressed and first class postage prepaid.

s/ Larry C. Weaver

OF COUNSEL

APPENDIX F1

IN THE CIRCUIT COURT FOR MORGAN COUNTY, ALABAMA

YUKIKO ERBE, PLAINTIFF,	)	
VS.	)	CIVIL ACTION NO.
GEORGE L. EADY, DEFENDANT	)	CV 80-1P

C O M P L A I N T

Comes the Plaintiff in the above styled cause and for her complaint against the Defendant, states as follows:

1. On or about, to-wit, October 18, 1974, an Interlocutory Judgment of Dissolution of Marriage was entered in the Superior Court of California, County of Santa Barbara, declaring that the parties were entitled to have their marriage dissolved.

2. The Court, in its Interlocutory Judgment of Dissolution of Marriage, or-

dered that the petitioner therein, George L. Eady, pay to the respondent therein, Yukiko Eady (now Yukiko Erbe), an amount equal to forty-one and one-half percent (41 1/2%) of his gross monthly military retirement payable on or before the first day of each month, commencing September 1, 1974.

3. The Plaintiff avers that said judgment remains in full force and effect and has not been modified and that the payments as ordered by the Superior Court of California have not been forthcoming since June, 1975.

WHEREFORE, Plaintiff demands judgment against the Defendant in the sum of Sixteen Thousand Dollars ($16,000.00) interest and costs.

EYSTER, EYSTER, KEY & TUBB

BY: s/ Larry Weaver

Attorneys for the Plaintiff

f1-3

P. O. Box 1607

Decatur, Alabama 35602

* * * * * * * * * * *

STATE OF ALABAMA, LAWRENCE COUNTY

I, LARRY SMITH, Clerk OF THE CIRCUIT COURT FOR LAWRENCE COUNTY, ALABAMA, DO HEREBY CERTIFY THAT THE FOREGOING IS A CORRECT COPY OF THE ORIGINAL Complaint IN THE ABOVE STATED CAUSE AS THE SAME APPEARS ON FILE AND OF RECORD IN MY OFFICE.

WITNESS MY HAND AND SEAL THIS THE 5th DAY OF March, 1982.

s/ Larry Smith

APPENDIX F2

YUKIKO ERBE,	)	IN THE CIRCUIT COURT OF
	)	
	)	MORGAN COUNTY, ALABAMA
Plaintiff	)	
	)	CASE NO. CV80-1P
vs	)	
	)	
GEORGE L. EADY,	)	
	)	
Defendant	)	

Tthe defendant has filed his motion to transfer this case to the Circuit Court of Lawrence County, Alabama, which is alleged to be his place of residence. Upon consideration of the same, and agreement of the parties to this suit, the Court is of the opinion that the case should be transferred.

IT IS THEREFORE ORDERED by the Court that this case be, and it is hereby transferred to the Circuit Court of Lawrence County, Alabama, the place of residence of the defendant. The Clerk will transfer the file of this case to the Clerk of Circuit Court of Lawrence County, Alabama

in accordance with the provisions of law governing such transfers.

This the 10th day of April, 1980.

s/ Newton B. Powell

CIRCUIT JUDGE

FILED

CIRCUIT COURT OF MORGAN COUNTY, AL

80 APR 11 P2:45

CLEO D. TEAGUE

CIRCUIT COURT

IN THE CIRCUIT COURT FOR LAWRENCE COUNTY, ALABAMA

YUKIKO ERBE,)
PLAINTIFF)
VS.) CIVIL ACTION NO.
) CV-80-90
GEORGE L. EADY,)
DEFENDANT)

ANSWER

Comes now the defendant and files this as his answer and pleas to the complaint and says as follows:

1. The defendant files the general issue, denies the material allegation of the complaint and denies that he owes the plaintiff any money or goods.

2. The defendant says that the alleged California Decree upon which this suit is brought is not a final judgment and is always subject to being amended, and is not such as can be given full

faith and credit.

3. The defendant says further that the plaintiff has not reduced her claim against him, which he says he does not owe, to a definite amount of money, under the California Courts, in order to have an effective judgment from a foreign state which he is trying to enforce in Alabama.

4. The defendant denies each and every material allegation of the complaint.

Now having answered the complaint herein, comes now George L. Eady and becomes the counter-plaintiff and makes the said Yukiko Erbe the counter-defendant and files the following as his counter-claim against her and says as follows:

1. The counter-plaintiff, George L. Eady claims of the counter-defendant, Yukiko Erbe, the sum of $14,000.00 in that by the terms of their said divorce decree the minor children of the parties

were awarded to George L. Eady. That under Alabama and California Law both parents owe the duty of supporting or helping support the minor children. The said George L. Eady claims $14,000.00 against Yukiko Erbe for her proportionate share of the cost of raising these children from the time of the divorce until they became of age. Counter-plaintiff alleges that the counter-defendant never contributed any money to their support from the date of the divorce, and that your counter-plaintiff, George L. Eady provided all of the support for the said minor children, and is entitled to be reimbursed from the counter-defendant herein for such support.

2. The counter-plaintiff requests the Court to modify the California decree to clarify the same as it provided alimony for the counter-defendant until she re-

married or until 1984. That she is now remarried and this counter-plaintiff requests this Court to modify and amend the decree of the California court to the extent that all alimony thereunder be decreeed to now be null and void.

3. Counter-plaintiff claims of the counter-defendant the sum of $2,500.00 for harassment and reimbursement of his expenses including, but not limited to, his expenses for procuring an attorney, losing time from work, in defending this suit, which was brough without merit or basis.

s/ Ralph E. Slate

RALPH E. SLATE, ATTORNEY FOR THE DEFENDANT AND COUNTER-PLAINTIFF, P. O. BOX 1344, DECATUR, AL 35602

I hereby certify that I have mailed a copy of the above and foregoing to Larry

Weaver, properly addressed, postage prepaid by United States Mail, on this the _____ day of September, 1980.

s/ Ralph E. Slate

RALPH E. SLATE

APPENDIX F4

IN THE CIRUCIT COURT FOR LAWRENCE COUNTY, ALABAMA

YUKIKO ERBE, PLAINTIFF,	)	
VS.	)	CIVIL ACTION NO. CV80-90
GEORGE L. EADY, DEFENDANT.	)	

AMENDED COMPLAINT

COMES the plaintiff, Yukiko Erbe, and amends her complaint to read as follows:

1. The plaintiff, Yukiko Erbe, is an individual over the age of twenty one (21) years residing in Newbury Park, California.

2. The defendant, George L. Eady, is an individual over the age of twenty one (21) years residing in Trinity, Alabama.

3. On or about, to-wit, October 18, 1974, an Interlocutory Judgment of Dissolution of Marriage was entered in the Superior Court of California, County of

Santa Barbara, declaring that the parties thereto were entitled to have their marraige dissolved.

4. The court, in its Interlocutory Judgment of Dissolution of Marriage, ordered that the petitioner therein, George L. Eady, pay to the respondent therein, Yukiko Eady, (now Yukiko Erbe) an amount equal to forty-one and one-half percent (41.5%) of his gross monthly military retirement payable on or before the first day of each month, commencing September 1, 1974.

5. Final judgment of Dissolution of Marriage was entered on January 8, 1975, and made binding all the provisions of the Interlocutory Judgment, which was entered on October 18, 1974.

6. The Interlocutory Judgment of Dissolution of Marriage and the Final Judgment of Dissolution of Marriage has not been modified by any court of the

State of California or any other Court.

7. The plaintiff avers that said final judgment remains in full force and effect and that payments of an amount equal to forty-one and one-half percent (41.5%) of monthly military retirement benefits which were ordered by the Superior Court of California to be paid by the defendant to the plaintiff have not been paid since June, 1975.

WHEREFORE, the plaintiff prays as follows;

A. That this Court take jurisdiction of this cause and order the above named plaintiff and defendant to be made parties to this Declaratory Judgment, and that process be issued to them and that they be required to plead to this bill for Declaratory Judgment.

B. That upon a final hearing of this cause, the Court will declare the judgment

rendered by the Superior Court, County of Santa Barbara, State of Alabama, Case No. SM14547, to be a good and valid judgment entitled to full faith and credit in the State of Alabama under the laws of the United States.

C. That the Court will enter a judgment against the defendant in the sum of Eighteen Thousand Dollars ($18,000.00), interest, and costs, which sum represents the amount of monthly military reitrement [sic] benefits which has not been paid and which is due and owing from the defendant to the plaintiff under the judgment of the Superior Court of California made the subject of this action.

D. That the judgment of the Superior Court of California made the subject of this action be given full faith and credit and the defendant ordered to pay future payments of said monthly military

retirment[sic] benefits to the plaintiff.

E. That the plaintiff be granted all such other and different relief as to which she may be entitled under the pleadings and proof and pray that she be granted general relief.

EYSTER, EYSTER, KEY & TUBB

BY: s/ John C. Eyster

Attorneys for Plaintiff

P. O. Box 1607

Decatur, Alabama 35602

CERTIFICATE OF SERVICE

I do hereby certify that I have on this the 1 day of Oct., 1980 served a copy of the foregoing on counsel for all parties to this proceeding by mailing the same by United States Mail properly addressed and first class postage prepaid.

s/ John C. Eyster

OF COUNSEL

FILED IN OPEN COURT THIS 1st DAY OF Oct.,

1980.

s/ Billy C. Burney

Circuit Judge

STATE OF ALABAMA, LAWRENCE COUNTY

I, LARRY SMITH, Clerk OF THE CIRCUIT COURT FOR LAWRENCE COUNTY, ALABAMA, DO HEREBY CERTIFY THAT THE FOREGOING IS A CORRECT COPY OF THE ORIGINAL Amended Complaint IN THE ABOVE STATED CAUSE, AS THE SAME APPEARS ON FILE AND OF RECORD IN MY OFFICE.

WITNESS BY HAND AND SEAL THIS THE 5th DAY OF March, 1982.

s/ Larry Smith

APPENDIX F5

IN THE CIRCUIT COURT OF LAWRENCE COUNTY, ALABAMA

YUKIKO ERBE, PLAINTIFF,	)	
-VS-	)	CIVIL ACTION NO. CV-80-90
GEORGE L. EADY, DEFENDANT.	)	

C A P T I O N

THE ABOVE ENTITLED CAUSE came on to be heard in the Thirty-Sixth Judicial Circuit Court of Alabama before the Honorable Billy C. Burney, Circuit Judge Presiding, without a Jury, on the 1st day of October, 1980, at the Lawrence County Courthouse, Moulton, Alabama, when the following proceedings were had, to-wit:

A P P E A R A N C E S

Honorable Larry Weaver, Attorney at Law, Law Firm of Eyster, Eyster, Key and Tubb, P. O. Box 1608, Decatur, Alabama, appearing on behalf of the Plaintiff, Yukiko Erbe.

Honorable John C. Eyster, Attor-

ney at Law, Law Firm of Eyster, Eyster, Key and Tubb, P. O. Box 1607, Decatur, Alabama, appearing on behalf of the Plaintiff, Yukiko Erbe.

Honorable Ralph E. Slate, Attorney at Law, P. O. Box 1344, Decatur, Alabama, appearing on behalf of the Defendant, George L. Eady.

[135]

P R O C E E D I N G S

THE COURT: All right, gentlemen, are you ready to proceed.

* * * * * * * * * * * *

THE COURT: I don't believe that it's any change. (Short Pause) Well, the only thing I can see is, the original Complaint alleges that the cause of action is based on an Interlocutory pleading, but this Amended Complaint is on the basis of a final judgment of the Superior Court of California; that the change?

MR. WEAVER: Basically, Your

Honor, that is all it is.

* * * * * * * * * * * *

[140]

THE COURT: Well, I think before we go any further, is there going to be any contention about the documents that are--and pleading as being entitled to full faith and credit from the State of California?

MR. SLATE: I don't think so, if you are talking about the two Decrees, Your Honor, the Interlocutory Decree and the Final Decree. I am not in position to contest them.

THE COURT: Okay.

MR. EYSTER: And we--

THE COURT: All right, if you want to go ahead and make the offer, then, the California Final Judgment at this time the Court will entertain that.

MR. EYSTER: All right. We offer this Interlocutory Decree rendered

in the case of George L. Eady and Yukiko Eady filed on October the 18th, 1974, consisting of three* pages of Interlocutory Degree [sic].

*[141]

And the Fourth Page of Notice of Entry of Judgment of the Interlocutory Decree.

And Page Five, Request and Declaration for Final Judgment of Dissolution of Marriage.

And then the Final Judgment issued on January the 8th, 1975.

And then a Notice of Entry of Judgment made on January 13th, 1975, by the Superior Court of California, County of Santa Barbara, together with the Certificate of the Court, as Plaintiff's Exhibit No. 1.

THE COURT: All right, the Court will accept it and admit the Decree

issued by the Superior Court for the State of California, being a binding and valid Judgment which is subject to full execution [sic] within the courts of the State of Alabama.

(Whereupon the instruments here-
(inabove referred to were marked
(for identification as
(Plaintiff's Exhibit No. 1, and
(received in evidence.

* * * * * * * *

[142]

THE COURT: All right, at this time, gentlemen, we will begin the discussion on the interpretation of the Decree. Do you have any testimony you want to offer with reference to the Claim and the Decree:

MR. EYSTER: Your Honor, I don't know if--from the statements we have had heretofore it appears we have got a different version of the law as

to what this Decree means,

[143]

whether it's alimony or community property, and that is basically the issue, as I see it, in the case. Of course we--

THE COURT: Well, I think as a matter of determination of the facts that it will have to be determined--you can go ahead and offer the evidence at this time to sustain your claim as to those dollars and values that have been paid and have not been paid. I take it there is going to be a difference in that evidence, so since you are the petitioner,--**** Mr. Eyster, you can offer any evidence at this time to show the enforcement of this Decree with reference to execution of it that occurred in the State of California and what has occurred subsequent to that time in the State of Alabama. ****

* * * * * * * *

PLAINTIFF'S EVIDENCE

Whereupon,

YUKIKO ERBE

The Plaintiff, was called as a witness in her own behalf, and, after having been first duly sworn, testified as follows, to-wit:

D I R E C T E X A M I N A T I O N

BY MR. WEAVER:

Would you state your name, please?

[144]

A. Yukiko Erbe.

Q. Okay. Mrs. Erbe, are you the same person that your name was at one time Yukiko Eady, and whose name is set forth in the Decree that we have just entered into evidence?

A. Yes, sir.

Q. Were you at one time married to Mr. George Eady?

A. Yes, sir.

Q. And when did you marry? On what date were you married?

A. August 29, 1951.

Q. 1951?

A. Uh-huh.

Q. Okay. Approximately how long were you married?

A. Twenty three years four months.

* * * * * * * *

Q. During the time that you were married to Mr. Eady, where was Mr. Eady employed?

A. Air Force.

* * * * * * * *

[145]

Q. For approximately how many years during your marriage was Mr. Eady in the Air Force?

A. Nineteen years.

* * * * * * * *

Q. All right. Let me show you this Divorce Decree ....

* * * * * * * *

Q. Were payments made to you under that Decree beginning when the Court ordered there, September the 1st, 1974, was the payment made on that date?

A. Yes.

Q. Were payments made after that?

A. Yes.

* * * * * * * * * * * *

[147]

Q. To your knowledge has the Final Decree entered in this case *** been modified or altered in any way?

A. No.

[148]

Q. And to your knowledge was this case appealed by Mr. Eady or by yourself? Was it taken to a higher court or was it changed in any fashion?

* * * * * * * * * * * *

Q. All right. Since your divorce back in 1974, and of course the Final Decree was entered in January of '75, have you had any contact with Mr. Eady?

A. I just talked once on telephone, which was only a short time. I asked him why he is not sending me the checks that he was suppose to send me. He said that he was back in Alabama. That was a law between you and California, I don't have nothing to do with it. So I said, "All right, I am going to do something about it." And he say, "Go right ahead and do whatever you want."

* * * * * * * * * * * *

[150]

Q. *****Was the last payment in June of 1975 approximately A Hundred Ninety Dollars and Thirty-seven Cents

($190.37)?

A. Yes.

Q. All right. Now, do you know whether those amounts continued to increase, the cost of living increases?

A. Yes.

Q. Mrs. Erbe, you have not received any checks from June of 1975 until this date; is that true?

A. True.

Q. All right. That is alimony, Military Retirement benefits or interest for your house or anything?

A. No.

MR. EYSTER: Judge, just for the record, we make no claim as to any amount due on the settlement of the house, or dollar per month figure, only Military Retirement.

MR. SLATE: It would be our contention that that matter was paid off

in May of '75 upon the sale of the house, so I was considering--

MR. EYSTER: We can stipulate that that is the fact.

MR. SLATE: Fine.

MR. WEAVER: That's all.

C R O S S E X A M I N A T I O N

Q. Mrs. Erbe, be patient with me. I have a Southern accent. If you don't understand what I say, please ask me and I will try to--

A. All right.

Q. Okay. Did you and Mr. Eady marry while he was stationed in Japan?

A. Yes.

Q. You later came to the United States and you became a Naturalized American Citizen?

A. Yes.

Q. During the time that the two of you stayed in the Military--that he

stayed in the Military while you were married, was he stationed overseas, outside the United States?

A. Once.

Q. Once?

A. Uh-huh.

Q. That was in Japan?

A. Korea and Japan.

Q. Okay. When you married him and you all came back to the United States, did he ever go overseas again? Did he ever go out of the United States again for a tour of duty after you and he came to this country?

A. Yes.

Q. Okay. Were you all ever stationed anywhere in the United States except California?

A. Yes.

Q. Do you recall any of the states?

A. Florida.

Q. Uh-huh.

A. Alabama.

Q. Yes.

A. Illinois. Montana.

Q. And California?

A. California, right.

Q. And that is where he retired in California?

A. Yes.

* * * * * * * *

Q. How long was he in California as a Service Man before he got out, approximately? I know you may not know the exact hours.

A. About eleven years.

Q. The last eleven years he was in California?

A. Yes, all together eleven years.

Q. He was in California more than one time, then, wasn't he?

A. Uh-huh.

Q. How many times were you stationed in California, or was he stationed in California?

A. Twice.

Q. Twice?

A. Uh-huh.

Q. The last time?

A. The last time--

[153]

Q. Approximately, I mean.

A. Five years.

Q. Was all that five years in Military Service?

A. Yes.

* * * * * * * * * * * *

Q. Did you and he continue to live in California after his retirement before the divorce?

A. Yes.

* * * * * * * * * * * *

[154]

Q. Mrs. Erbe, you are now married to the gentlemen sitting over by the wall (Indicating)?

A. Yes.

Q. What is his name, his first name?

A. Bob Erbe.

Q. Bob Erbe?

A. Yes.

Q. When were you and Mr. Bob Erbe married?

A. May 31, '75.

Q. May 31, '75?

[155]

A. Yes.

Q. And the last check you received from Mr. Eady was June 1 of '75?

A. Yes.

* * * * * * * * * * * *

[156]

MR. SLATE: I believe that's all.

MR. WEAVER: That's all.

(WITNESS EXCUSED FROM WITNESS STAND)

* * * * * * * * *

MR. EYSTER: Okay. Your Honor, we would like to offer some of the California Law, and we will just show those to the Clerk--to the Reporter. Would it be all right to offer the original and then we will withdraw that--

THE COURT: You made copies of those cases?

MR. EYSTER: Yes, sir. We will just state the name of them.

MR. WEAVER: This is the case--a case which is styled in re marriage of Fithian versus Fithian, F-I-T-H-I-A-N, and it's recorded in 111 Cal. Rptr. 369 and at 517 P. 2d 449, and it is a 1974 case.

* * * * * * * *

MR. WEAVER: Right. The second case is--

* * * * * * * *

(Whereupon the instruments here-
(inabove referred to were marked
(for identification as Plaintiff's
(Exhibit No. 2.

MR. WEAVER: Likewise, in re Marriage of Wilson, which is cited at 112 Cal. Rptr. 405, at 519 P. 2d 165, and it's a 1974 case again, and mark that as Plaintiff's Exhibit No. 3.

(Whereupon the instrument herein-
(above referred to was marked for
(identification as Plaintiff's
(Exhibit No. 3.

[158]

MR. WEAVER: And as well, we have a volume of West Annotated California Code, and the pertinent section 164, and we have not made copies of this, but it is at Page 783.

* * * * * * * * * * * *

(Whereupon the instrument herein-
(above referred to, a copy was later

(made thereof and marked for
(identification as Plaintiff's
(Exhibit No. 4.

THE COURT: All right, they are in.

(Whereupon the instruments here-
(inabove referred to, having been
(marked previously for identifi-
(cation as Plaintiff's Exhibits
(No. 2, 3 & 4, were received in
(evidence.

---

[159]

THE COURT: All right, do you have any other offers?

MR. EYSTER: Just one second, Your Honor. (Short Pause) Your Honor, subject to getting the testimony about the value of the payments, which we understand we will be allowed to on Cross Examination, then we would rest.

THE COURT: Okay.

PLAINTIFF RESTS

* * * * * * * * * * * *

DEFENDANT'S EVIDENCE

[160]

GEORGE L. EADY

The defendant, was called as a Witness in his own behalf and, after having been first duly sworn, testified as follows, to-wit:

D I R E C T E X A M I N A T I O N

BY MR. SLATE:

Q. Tell the Judge your name, George?

A. George Larimore Eady.

**** ****

Q. When did you go into the Military Service?

A. The 12th of January, 1948.

* * * * * * * * * * * *

[161]

Q. ****How long did you stay in the Air Force on active duty?

A. A little over 21 years.

Q. What was your retirement rank?

A. E-7, Master Sergeant.

* * * * * * * * * * * *

Q. When did you retire from the Military?

A. The 1st of October of '69.

* * * * * * * * * * *

[169]

Q. Is it your testimony that you paid this lady a Dollar a month and the forty-two and a half percent of your Military pay for a month until June, or until about June the 1st, like she said--

A. Yes.

Q. --of '75?

A. Yes.

Q. And that you have not paid her any after that, and she got married in late May of '75?

A. Yes.

Q. George, has your retirement pay, like

everything else, increased over the years?

A. Yes, it has. We get cost of living raise, and that's all.

Q. Of course you don't know how long that cost of living raise will go, or whether they will cut it out if the cost of living goes down?

A. Yes.

Q. **** [170]

Before 31 March, 1980, were you drawing Six Hundred and Sixty-two Dollars and Sixty-seven Cents gross?

A. Yes sir.

Q. Net, Five Eighty-seven Ninety-eight?

A. Yes. sir.

* * * * * * * * * * * *

Q. The old net was Five Fifty-six Fifty-seven?

A. Yes, sir.

Q. The new net is Five Eighty-seven Ninety-eight?

A. Yes.

* * * * * * * * * * * *

[171]

Q. This is the new one, cost of living, effective 30 September, so it will start with the October check, won't it?

A. I am not sure. I think it's included in the September check, in September.

Q. It says, "Effective 30 September--"

A. Pay.

Q. Okay.

A. So it would be.

[172]

Q. So that shows Seven Hundred Fifty-six Dollars--

A. And Fifty-two Cents.

Q. --and Fifty-two Cents gross--

A. Right.

Q. --Six Hundred--

A. Thirty.

Q. --Thirty Dollars and Seventy-one Cents

net?

A. Correct.

* * * * * * * * * * * *

[174]

CROSS EXAMINATION

BY MR. EYSTER:

Q. Mr. Eady, how much was your retirement pay at the time of this Divorce?

A. I couldn't tell you right off, really.

Q. All right.

A. That amount that they ordered she got would have been forty-one percent of it?

Q. Forty-one percent of it?

A. Yes.

Q. It was somewhere over Four Hundred Dollars a month?

A. Yes.

Q. And then it has consistently risen since the date of this Divorce?

A. Cost of living, yes.

Q. And is now up to Seven Hundred and Fifty-six; is that correct?

A. Something, whatever we mentioned before.

* * * * * * * * * * * *

[178]

REDIRECT EXAMINATION

BY MR. SLATE:

* * * * * * * * * * * *

Q. Did you know from June the 1st of 1975 until you got this lawsuit served on you in 1980 that she was making any claim against you?

A. No.

Q. Do you remember her calling you once, after you came to Alabama, like she said?

A. Yes, she did call me.

Q. Did she ask you about your military payments and so forth?

A. Yes.

Q. Did you tell her at that time that you weren't going to make any more,

she was married or--

A. I told her that it was awarded illegally to start with against Federal law, and that I didn't figure it applied.

* * * * * * * * * * * *

[179]

Q. And you knew at that time that she was remarried:

A. Right.

Q. And that's the last you heard from her from '75 until 1980, when the Sheriff served the papers on you?

A. Right.

* * * * * * * *

THE COURT: Any further questions?

MR. EYSTER: No, sir.

(WITNESS EXCUSED FROM WITNESS STAND)

* * * * * * * * * * *

[180]

DEFENDANT RESTS

THE COURT: All right, do you have any other evidence that you want to offer?

MR. EYSTER: No, sir, that is all we have.

PLAINTIFF RESTS

EVIDENCE CLOSED

* * * * * * * * * * * *

[181]

* * * * * * * * * * * *

THE COURT: Of course as I understand it here, we have got a question of law, as I understand what Mr. Eyster and Mr. Weaver's contention is, that the forty-one percent represented a division of community property in the State of California, and was as such not an award of alimony, but you are contending that the award was actually alimony.

MR. SLATE: And died when she

remarried.

THE COURT: Yes.

* * * * * * * * * * * *

[182]

MR. EYSTER: We understand that. And we are here on a question of, is that military retirement alimony, or is it community property.

THE COURT: Yes.

* * * * * * * * * * * *

[186]

THE COURT: Okay. All right, then submit any authorities or any argument that you deem appropriate.

* * * * * * * * * * * *

END OF PROCEEDINGS

APPENDIX F6

NOTICE OF APPEAL TO THE

SUPREME COURT OF ALABAMA

YUKIKO ERBE,	IN THE CIRCUIT COURT FOR
APPELLANT,	LAWRENCE COUNTY, ALABAMA
VS.	CIVIL ACTION NO. CV 80-90
GEORGE L. EADY,	DATE OF JUDGMENT:
APPELLEE.	December 31, 1980

Notice is hereby given that Yukiko Erbe appeals to the above named Court from the Order of the Court of December 31, 1980 entered in this cause. The amount sought was more than Ten Thousand Dollars ($10,000.00) and judgment was for the defendant.

Filed with this Notice of Appeal is security for costs of appeal.

EYSTER, EYSTER, KEY & TUBB

BY: s/ Larry C. Weaver

Attorneys for Appellant

P. O. Box 1607

Decatur, Alabama 35602

FILED: 1-23-81

date

CERTIFIED AS A TRUE COPY:

s/ Larry Smith

CIRCUIT CLERK

FILED IN OFFICE

JAN 23 1981

s/ Larry Smith

Clerk

APPENDIX F7

June 16, 1981

THE STATE OF ALABAMA - - JUDICIAL DEPARMENT

IN THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1980-81

80-269

YUKIKO ERBE

V. LAWRENCE CIRCUIT COURT

GEORGE EADY

ORDER

It appears to the Court that this case is within the appellate jurisdiction of the Court of Civil Appeals.

IT IS, THEREFORE, ORDERED that this cause be transferred to the Court of Civil Appeals.

Torbert, C. J., and Jones, Shores, Embry, and Beatty, JJ., concur.

I. J. O. Sentell, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and

correct copy of the instrument(s) herewith set out as same appears of record in said Court.

Witness my hand this 17th day of JUNE 1981.

s/ J. O. Sentell

Clerk, Supreme Court of Alabama

APPENDIX F8

IN THE CIRCUIT COURT FOR LAWRENCE COUNTY, ALABAMA

YUKIKO ERBE, PLAINTIFF,	)	
VS.	)	CIVIL ACTION NO. CV80-90
GEORGE L. EADY, DEFENDANT.	)	

MOTION FOR REVISION OF ORDER

COMES the plaintiff, Yukiko Erbe, in the above styled cause and respectfully moves the court to revise its order heretofore rendered on December 31, 1980 in conformity with the opinion of the Court of Civil Appeals of Alabama attached hereto and to allow the plaintiff leave to submit further proof of damages.

EYSTER, EYSTER, KEY & TUBB

BY: s/ Larry Weaver

Attorneys for plaintiff

P. O. Box 1607

Decatur, Alabama 35602

CERTIFICATE OF SERVICE

I do hereby certify that I have on this the 28th day of December, 1981 served a copy of the foregoing on counsel for all parties to this proceeding by mailing the same by United States Mail properly addressed and First Class Postage Prepaid.

s/ Larry Weaver

OF COUNSEL

O R D E R

Upon motion of the plaintiff, Yukiko Erbe, it is hereby ORDERED, ADJUDGED AND DECREED that the above styled cause is set for hearing on the 13th day of Jan. @ 9:00, 1982.

DONE this 30 day of Dec., 1981.

s/ Billy C. Burney

CIRCUIT JUDGE

STATE OF ALABAMA, LAWRENCE COUNTY

I, LARRY SMITH, Clerk OF THE

CIRCUIT COURT FOR LAWRENCE COUNTY, ALABAMA, DO HEREBY CERTIFY THAT THE FOREGOING IS A CORRECT COPY OF THE ORIGINAL Motion IN THE ABOVE STATED CAUSE, AS THE SAME APPEARS ON FILE AND ON RECORD IN MY OFFICE.

WITNESS MY HAND AND SEAL THIS THE 5th DAY OF March, 1982.

s/ Larry Smith

APPENDIX F9

CIVIL CASE ACTION SUMMARY

Case Number

CV-80-90

IN THE Circuit COURT OF Lawrence COUNTY

Case Number CV-80-90 * * * * * *

Plaintiff's Name	Defendant's Name
YUKIKO ERBE	GEORGE L. EADY

* * * * * * * * * * * *

Date	ACTIONS
4-17-80	Received file from Morgan Co.

* * * * * * * * * * * *

2-16-82	All matters pending herein are continued pending defendant"s appeal to U.S. Supreme Court.

* * * * * * * * * * * *

STATE OF ALABAMA, LAWRENCE COUNTY

I, LARRY SMITH, Clerk OF THE CIRCUIT COURT FOR LAWRENCE COUNTY, ALABAMA, DO HEREBY CERTIFY THAT THE FOREGOING IS A CORRECT COPY OF THE

ORIGINAL Docket Sheet IN THE ABOVE STATED CAUSE, AS THE SAME APPEARS ON FILE AND ON RECORD IN MY OFFICE.

WITNESS MY HAND AND SEAL THIS THE 5th DAY OF March, 1982.

s/ Larry Smith

APPENDIX G

AFFIDAVIT

OF

EUGENE L. HUSEMAN

Before me the undersigned authority, in and for said state and said county, personally appeared EUGENE L. HUSEMAN, and after being duly sworn, deposes and says as follows:

My name is Eugene L. Huseman. I am presently judge of the Municipal Court, Lompoc- Judicial District, Lompoc, California. I was licensed to practice law in the State of California. On August 14, 1974, I was present at the trial, representing Yukiko Eady, respondent, and have personal knowledge of the case styled in re the marriage of George L. Eady and Yukiko Eady, case number SM 14547 in Superior Court of California, County of Santa Barbara. It was stipulated for said trial that petitioner, George L. Eady, would pay re-

spondent, Yukiko Eady, an amount equal to 41.5% of his gross monthly military retirement and that said military retirement constituted community property, the said military retirement payments did not constitute alimony.

The stipulation was in accordance with the law of the State of California (the State of California adheres to the concept of community property) which states that military retirement benefits, whether or not vested, represent a property interest and to the extent that such rights derive from employment during coverture, they comprise a community asset and are subject to division in proceeds for dissolution of marriage.

The stipulation was based on the fact that the petitioner, George L. Eady, and the respondent, Yukiko Eady, had been married for approximately twenty (20) years

during wich time petitioner, George L. Eady, was employed by the U.S. Air Force and during which time said military retirement benefits accrued.

A true and correct copy of the transcript of the stipulation entered into between the petitioner, George L. Eady and the respondent, Yukiko Eady, is attached hereto and marked Exhibit A.

I declare under the penalty of perjury that the foregoing is true and correct.

s/ Eugene L. Huseman

EUGENE L. HUSEMAN

Sworn before me this 20th day of August, 1980.

[COURT SEAL]

s/ Lynn Cady

LYNN CADY

Clerk of the Court

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SANTA BARBARA

In re the Marriage of	)	
	)	
GEORGE L. EADY,	)	
	)	
Petitioner	)	No. SM 14547
	)	
and	)	
	)	
YUKIKO EADY,	)	
	)	
Respondent.	)	

HON. ROBERT L. TRAPP, JUDGE

August 14, 1974

APPEARANCES

For the Petitioner: JAMES D. FINLEY
Attorney at Law
P. O. Box 906
Lompoc, California
93436

EXHIBIT "A"

For the respondent: HUSEMAN & HUSEMAN
Attorneys at Law
By Eugene L. Huseman
308 North H Street
Lompoc, California
93436

LaVerne C. Stroope, C.S.R.
OFFICIAL COURT REPORTER
SANTA MARIA, CALIFORNIA

[_____]

August 14, 1974

1:30 p.m.

THE COURT: Eady and Eady, Number SM 14547.

MR. HUSEMAN: We have arrived at a stipulated settlement concerning the property rights of the parties.

I will ask Mr. Finley to correct me --

MR. FINLEY: Go right ahead. I'll watch you.

MR. HUSEMAN: The parties stipulate the division of the community property to be as follows:

A. The house and lot located at 4170 Polaris Avenue is to be awarded to the petitioner husband, subject to the encumbrances thereon.

The household furniture, furnishings and appliances located in the home at Polaris is to be awarded to the petitioner husband.

The sewing machine, two knitting machines, T.V.-Stereo console, a Japanese wall clock, is to be awarded to the respondent wife.

The aircraft maintenance tools--

MR. FINLEY: If we might at this time indicate there is an encumbrance on that she will be responsible for.

MR. HUSEMAN: That is on the Singer sewing machine.

MR. FINLEY: Yeah.

MR. HUSEMAN: Yes. Subject to encumbrance on the Singer sewing machine.

The aircraft mechanic tools and other tools be awarded to the husband.

The 1968 Ford Thunderbird is to be awarded to the wife.

The 1972 Toyota automobile is to be awarded to the husband, subject to the encumbrance thereon. The husband agrees to make all payments thereon and hold the wife harmless.

MR. FINLEY: That's correct.

MR. HUSEMAN: The husband is to pay to wife the nominal amount of One Dollar per month spousal support, commencing September 1st, 1974, and terminating September 1, 1984. Wife waives any further spousal support from and after that date;

the wife; until such time as the husband, or rather, the wife remarries

or dies.

That the care, custody and control of the two minor children is awarded to the petitioner husband subject to reasonable rights of visitation with the respondent wife.

That the husband is to pay to wife an amount equal to 41.5 per cent of the gross monthly military retirement, to be paid on or before the first day of each month, commencing September first, 1974. This amount presently is in the amount of $178.03 per month.

Second, the husband is to sign and execute a promissory note in the principal amount of $8,169.00, with principal and interest payments in the amount of $72.00 per month, commencing September 1, 1974. Note will carry interest at the rate of seven

per cent per annum on the unpaid balance. This note to be secured by a Deed of Trust upon the home of the parties located at 4170 Polaris.

MR. FINLEY: Did you indicate it is due and payable in five years?

MR. HUSEMAN: I am sorry. And that the entire balance will be due and payable on September first, 1979.

THE COURT: Okay.

MR. HUSEMAN: Each party is to pay and bear their own attorney's fees and court costs.

MR. FINLEY: So the record is clear in this connection, there is a prior order made that the petitioner pay the sum of $350.00 on account. This was indicated to be out of community property, but this will be the sole responsibility of the petitioner in this case from now on.

THE COURT: That order will be rescinded.

MR. FINLEY: Thank you. There was a Master Charge which was one of the indebtednesses which the petitioner has agreed to pay in this case.

MR. HUSEMAN: The Master Charge account is to be paid by the petitioner husband.

MR. FINLEY: Signature loan that is indicated is no longer an outstanding obligation.

THE COURT: Vandenberg Credit Union.

MR. HUSEMAN: That's been taken care of.

MR. EADY: That is on the car.

THE COURT: Looks like everything.

MR. HUSEMAN: And we may stipulate that the matter may proceed upon the response of the --

MR. FINLEY: So stipulated. If we may, at this time we'll exit the courtroom, your Honor.

* * *

STATE OF CALIFORNIA)
) SS.
COUNTY OF SANTA BARBARA)

I, LaVerne C. Stroope, C.S.R, Official Reporter of the Superior Court of the State of California, in and for the County of Santa Barbara, do hereby certify that the foregoing pages 2 through 5, comprise a full, true and correct transcript of that portion of the proceedings had in the within-entitled matter, recorded by me by stenotype on the day and at the hour herein written, and thereafter transcribed by me into typewriting.

In compliance with Section 8016 of the Business and Professions Code, I certify under penalty of perjury that I am a CERTIFIED shorthand reporter with license number 1660 in full force and effect.

DATED this 1st day of Octboer, 1974.

s/ LaVerne C. Stroope

APPENDIX H

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Article I, § 8, cl. 12, of the United States Constitution provides, in context and in relevant part, that

> The Congress shall have Power ***
>
> To raise and support Armies....

Article I, § 8, cl. 14, of the United States Constitution provides, in context, that

> The Congress shall have Power***
>
> To make Rules for the Government and Regulation of the land and naval forces....

Article III, § 1, of the United States Constitution provides, in context and in relevant part, that

> The judicial Power of the United States ... shall be vested in one supreme Court, and in such

> inferior Courts as the Congress may from time to time ordain and establish.

Article III, § 2, cl. 1, provides, in context and in relevant part, that

> The judicial Power [of the United States] shall extend to all Cases, in Law and Equity, arising under this Constitution ....[or] the Laws of the United States....

Article VI, cl. 2, of the United States Constitution provides, in relevant part, that

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the

thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

As of 1 October 1969, 10 USC § 8914 read as follows:

Under regulations to be prescribed by the Secretary of the Air Force, a regular enlisted member of the Air Force who has at least 20, but less than 30, years of service computed under section 8925 of this title may, upon his request, be retired. He then becomes a member of the Air Force Reserve, and shall perform such active duty as may be prescribed under law, until his service computed under section 8925 of this title, plus his inactive service as a member of the Air Force Reserve, equals 30 years.

The text of 10 USC § 8929 provides that:

> A member of the Air Force retired under this chapter is entitled to retired pay computed under chapter 871 of this title.

In context, 28 USC §1257 (3) reads as follows:

> § 1257.
>
> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * * * * * *
>
> (3) By writ of Certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to

the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

37 USC § 701 (c) provides that

> An enlisted member of the Army or Air Force may not assign his pay, if he does so, the assignment is void.

As amended, Cal. Civ. Code § 4800 reads, in relevant part, as follows:

> § 4800. Division of community and quasi-community property
>
> (a) Time of division: equality; valuation.
>
> (a) Except upon the written agreement of the parties, or on oral

stipulation of the parties in open court, the court shall, either in its interlocutory judgment of dissolution of the marriage, in its judgment decreeing the legal separation of the parties, or at a later time if it expressly reserves jurisdiction to make such a property division, divide the community property and the quasi-community property of the parties, including any such property from which a homestead has been selected, equally. For purposes of making such division, the court shall value the assets and liabilities as near as practicable to the time of trial, except that, upon 30 days' notice by the moving party to the other party, the

court for good cause shown may value all or any portion of the assets and liabilities at a date after separation and prior to trial to accomplish an equal division of the community property and the quasi-community property of the parties in an equitable manner.

(b) Manner of division.

(b) Notwithstanding subdivision (a), the court may divide the community property and quasi-community property of the parties as follows:

(1) Where economic circumstances warrant, the court may award any asset to one party on such conditions as it deems proper to effect a substantially equal division of the property.

(2) As an additional award or offset against existing property, the court may award, from a party's share, any sum it determines to have been deliberately misappropriated by such party to the exclusion of the community property or quasi-community property interest of the other party.

(3) If the net value of the community property and quasi-community property is less than five thousand dollars ($5,000) and one party cannot be located through the exercise of reasonable diligence, the court may award all such property to the other party on such conditions as it deems proper in its final judgment decreeing the dissolution of the

marriage or in its judgment decreeing the legal separation of the parties.

As amended, Cal. Civ. Code § 4803 reads as follows:

§ 4803. Quasi-community property.

As used in this part, "quasi-community property" means all real or personal property, wherever situated heretofore or hereafter acquired in any of the following ways:

(a) By either spouse while domiciled elsewhere which would have been community property if the spouse who acquired the property had been domiciled in this state at the time of its acquisition.

(b) In exchange for real or personal property, wherever situated, which would have been com-

munity property if the spouse who acquired the property so exchanged had been domiciled in this state at the time of its acquisition.

Section 6.02 of Amendment 328 to the Alabama Constitution of 1901 reads as follows:

6.02. The supreme court.

(a) The supreme court shall be the highest court of the state and shall consist of one chief justice and such number of associate justices as may be prescribed by law.

(b) The supreme court shall have original jurisdiction (1) of cases and controversies as provided by this Constitution, (2) to issue such remedial writs or orders as may be

necessary to give it general supervision and control of courts of inferior jurisdiction, and (3) to answer questions of state law certified by a court of the United States.

(c) The supreme court shall have such appellate jurisdiction as may be provided by law.

Section 6.03(b) of Amendment 328 to the Alabama Constitution of 1901 reads as follows:

6.03 Courts of appeals.

* * * * * * * * * * * *

(b) The court of civil appeals shall consist of such number of judges as may be provided by law and shall exercise appellate jurisdiction under such terms and conditions as shall be provided by law

and by rules of the supreme court.

Ala. Code 1975, § 12-1-4 reads as follows:

§12-1-4. Transfer of cases improperly submitted to supreme court or courts of appeals.

When any case is submitted to the supreme court which should have gone to one of the courts of appeals or is submitted to one court of appeals when it should have gone to the other, it must not be dismissed but shall be transferred to the proper court; and, when any case is submitted to a court of appeals which should have gone to the supreme court, it shall be transfrerred to the supreme court.

Ala. Code 1975, § 12-2-7(1) reads as follows:

§ 12-2-7. Jurisdiction and powers of court generally.

The supreme court shall have authority:

> (1) To exercise appellate jurisdiction coextensive with the state, under such restrictions and regulations as are prescribed by law; but, in deciding appeals, no weight shall be given the decision of the trial judge upon the facts where the evidence is not taken orally before the judge, but in such cases the supreme court shall weigh the evidence give judgment as it deems just;

Ala. Code 1975. § 12-3-10, reads as follows:

§ 12-3-10. Appellate jurisdiction of court of civil appeals.

The court of civil appeals shall have exclusive appellate jurisdiction of all civil cases where the amount involved, exclusive of interest and costs, does not exceed $10,000.00, all appeals from administrative agencies other than the Alabama public service commission, all appeals in workmen's compensation cases, all appeals in domestic relations cases, including annulment, divorce, adoption and child custody cases and all extraordinary writs arising from appeals in said cases. Where there is a recovery in the court below of any amount other than costs, the amount of

such recovery shall be deemed to be the amount involved; otherwise, the amount claimed shall be deemed to be the amount involved; except, that in actions of detinue the alternate value of the property as found by the court or jury shall be deemed to be the amount involved.

Subdivs. (a) and (c) of Rule 39 of the Alabama Rules of Appellate Procedure (Ala.R.App.P.) read as follows:

Rule 39

Review of decisions of courts of appeal.

(a) Method. Decisions of the courts of appeals may be reviewed by the supreme court upon petition for writ of certiorari only after the court of appeals has overruled an application for rehearing on the point, issue or decision complained of.

* * * * * * * * * * * *

(c) Grounds. The petition for writ of certiorari to this court in a criminal case in which the death penalty was imposed as punishment will be granted as a matter of right. In all other cases, civil or criminal, petitions for writs of certiorari will be considered only:

(1) From decisions initially holding valid or invalid a city ordinance, a state statute or a federal statute or treaty, or initially construing a controlling provision of the Alabama or federal Constitution;

(2) From decisions that affect a class of constitutional, state or county officers;

(3) From decisions where a material question requiring de-

cision is one of first impression in Alabama;

(4) From decisions in conflict with prior decisions of the supreme court or courts of appeals; provided that when (4) is the basis of the petition, it must quote that part of the opinion of the appropriate court of appeals, and that part of the prior decision of the supreme court with which the conflict is alleged; or if the conflict is with a prior decision of the court of appeals, the conflicting passages must be quoted; or it shall state specifically and with particularity wherein such decision is in conflict; and,

(5) Where petitioner seeks to have controlling supreme

court cases overruled which were followed in the decision of the court of appeals.

Opposition

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No. 81-1739

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GEORGE L. EADY,
Petitioner,

vs.

YUKIKO ERBE,
Respondent.

On Writ of Certiorari
To The Court of Civil Appeals
of Alabama

BRIEF FOR RESPONDENT

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May 3, 1982

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COUNTERSTATEMENT OF QUESTION PRESENTED

Does *McCarty* v. *McCarty*, 101 S.Ct. 2728 (1981) sufficiently affect an Alabama case which was pending on appeal to the Court of Civil Appeals of Alabama and which was seeking to enforce a *final* California judgment that incorporated a *stipulated* property settlement dealing with military retirement benefits so as to provide the basis for granting of a writ of certiorari by the Supreme Court of the United States.

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BRIEF FOR RESPONDENT

REASONS FOR DENYING THE WRIT

There are four reasons why the petition for writ of certiorari should be denied:

1. The Supreme Court Of The United States Does Not Have Jurisdiction Of This Case Under 28 U.S.C. § 1257(3) Since The Case Does Not Involve A United States Statute, Nor A State Statute, Nor Is Any Title, Right, Privilege Or Immunity Specially Set Up Or Claimed Under The Constitution, Treaties Or Statutes Of, Or Commission Held Or Authority Exercised Under, The United States.

A petition for divorce was filed by George L. Eady (hereinafter referred to as "Eady") in the Superior Court of the County of Santa Barbara, State of California which resulted in an interlocutory judgment of dissolution of marriage on October 18, 1974 and a final judgment of dissolution of marriage on January 8, 1975. The interlocutory judgment and final judgment incorporated a *stipulated settlement of property rights* wherein Yukiko Eady (who is one and the same as the respondent, Yukiko Erbe and who is hereinafter referred to as "Erbe") was to be paid 41.5% of Eady's military retirement benefits. *Neither Eady nor Erbe appealed the final judgment of the Superior Court of California.*

When Eady discontinued his payment of 41.5% of the monthly military retirement benefits to Erbe, she sought to enforce the provisions of the California judgment in the Circuit Court for Lawrence County, Alabama. At that point the true questions were: (1) Whether the California judgment was entitled to full faith and credit in Alabama; (2) Whether the California judgment was ambiguous; (3) If the California judgment was ambiguous, how should it be construed, and (4) If it was construed as Erbe contended (that is, that the military retirement provision in the California judgment constituted a property right rather than alimony), what were the damages.

The trial court in Lawrence County, Alabama construed the provision dealing with military retirement benefits in the California judgment as being one dealing with alimony rather than a property right. Erbe appealed that decision to the Court of Civil Appeals of Alabama. After filing notice of appeal, but before the case was submitted to the Court of Civil Appeals of Alabama, *McCarty* v. *McCarty,* 101 S.Ct. 2728 (1981) was decided. At that point the true question on appeal was: Whether the Circuit Court of Lawrence County, Alabama misconstrued the California judgment. The Court of Civil Appeals was concerned with whether there *was* a property right, not the underlying character of the property right.

Therefore, since Eady had not appealed from the final judgment of the Superior Court of California and since the final judgment had been based on a stipulated property settlement, *McCarty* was inapplicable to the case on appeal. *Erspan* v. *Badgett,* 659 F.2d 26 (5th Cir. 1981).

If Eady is to be allowed to argue that military retirement benefits are not community property and that his stipulated property settlement is invalid and that the *McCarty* decision is applicable to his case, it should be because he appealed from the California judgment in 1975. *Federated Department Stores, Inc.* v. *Moitie,* 101 S.Ct. 2424 (1981). He should not be allowed to argue that an evolvement of the law somehow vitiates his stipulated property settlement with his ex-wife as incorporated in the final judgment of the Superior Court of California.

The instant case does not involve a United States statute, nor a State statute, nor is any title, right, privilege or immunity specially set up or claimed under the Constitution, treaties, or statutes of, or commission held or authority exercised under, the United States.

2. The Opinion And Judgment Of The Court Of Civil Appeals Of Alabama Rests On Independent And Adequate State Grounds.

Eady's effort to inflate the posture of the case before the Court of Civil Appeals of Alabama to be one involving the Federal Constitution and Federal Statutes avoids the true question. The Court of Civil Appeals of Alabama was called upon to determine whether the provision in the final California judgment dealing with military retirement benefits was one that involved a property right or one that involved alimony. After that court decided that the provision dealt with a property right, and that that right was vested under Alabama law and California law, nothing was left to be decided. Thus, despite the fact that *McCarty* rendered it improper for California Courts to treat

military retirement benefits as community property, the *McCarty* case had no effect upon the decision as to whether the military retirement provision of the California judgment dealt with a property right. See *Orr* v. *Orr*, 440 U.S. 268 at (1979).

The fact that there was a stipulated property settlement and a property right which was vested under Alabama law and California law provided adequate and independent state grounds for the decision of the Court of Civil Appeals of Alabama.

3. The Opinion And Judgment Of The Court Of Civil Appeals Of Alabama Is Not Final.

On August 26, 1981, the Court of Civil Appeals of Alabama reversed and remanded the order of the Circuit Court for Lawrence County, Alabama. Application for rehearing by Eady was overruled on August 23, 1981. Petition for writ of certiorari to the Supreme Court of Alabama by Eady was denied on December 18, 1981.

On December 29, 1981, Erbe filed a motion for revision of the original order of the trial court, seeking to have it revised to conform with the opinion of the Court of Civil Appeals. On February 16, 1982, at the hearing of the motion, the trial court continued the hearing pending the outcome of Eady's petition for writ of certiorari to the Supreme Court of the United States.

Notwithstanding the propriety of the continuance, the trial court appeared undecided at said hearing as to the meaning of the decision of the said Court of Civil Appeals. More specifically, the trial court appeared undecided from the opinion of the Court of Civil Appeals as to whether the payment by Eady of 41.5% of his military retirement benefits to Erbe was to continue after the date of the original trial of the case.

On April 19, 1982, Erbe filed a petition for writ of mandamus to require the Honorable Billy Burney, Circuit Court Judge for

Lawrence County, Alabama, to revise his order of December 31, 1980 to conform with the opinion of the Court of Civil Appeals of Alabama.

Whether the Court of Civil Appeals of Alabama requires the Circuit Court of Lawrence County, Alabama to enter judgment for Erbe and whether the Circuit Court for Lawrence County, Alabama enters a judgment which includes post-trial and post-*McCarty* amounts are questions which prevent the opinion and judgment of the Court of Civil Appeals of Alabama from being final.

The opinion and judgment of the Court of Civil Appeals of Alabama is not final and therefore is not subject to review by the Supreme Court of the United States.

4. The Decision Of The Court Of Civil Appeals Of Alabama Is Obviously Correct And Involves No Conflict Of Opinion Or Other Basis For Review By This Court.

Even apart from the above issues, no reason is apparent for review of the decision below. To review the decision would give credibility to the idea that the parties right to contract through a stipulated property settlement could be impaired by a subsequent case, after a property right created by the settlement had vested. The final California judgment was based on a stipulation between the parties entered into on October 18, 1974, and embodied and finalized by the Superior Court of California through incorporation in a final judgment on January 8, 1975. The fundamental principle of res judicata would be violated if the law, as it evolves to meet new conditions of society, was made retroactive to re-open, for another trial, matters concluded and laid to rest under rules of law existing at the time they were tried. *Federated Department Stores, Inc.* v. *Moitie,* 101 S.Ct. 2424 (1981).

Furthermore, if the *McCarty* case was applied retroactively to the instant case, aside from impairing the contract rights of the parties, it would require the reopening of thousands of cases decided by California courts and other courts. It would necessitate the re-division of community property, when, as in the instant case, the community property has long since been disposed of. *Erspan* v. *Badgett,* 659 F.2d 26 at 28, 29 n.2 (5th Cir. 1981).

The decision of the Court of Civil Appeals of Alabama is obviously correct and involves no conflict of opinion or other basis for review by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari filed by George L. Eady should be denied.

Respectfully submitted,

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